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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91122524
Party	Defendant Wayne R. Gray
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EXHIBIT No. 12

1 IN THE UNITED STATES DISTRICT COURT
2 DISTRICT OF UTAH, CENTRAL DIVISION

3

4 THE SCO GROUP, INC., a Delaware)
5 corporation,)
6 Plaintiff,)

7 vs.) Case No. 2:04-CV-139TS

8 NOVELL, INC., a Delaware)
9 corporation,)
10 Defendant.)

11 _____)

12 AND RELATED COUNTERCLAIMS.)

13 _____)

14

15 BEFORE THE HONORABLE TED STEWART

16 -----

17 March 9, 2010

18 Jury Trial

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24 REPORTED BY: Patti Walker, CSR, RPR, CP

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I N D E X

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Witness

Examination By

PAGE

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Robert J. Frankenberg

Mr. Singer (Direct)

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Mr. Brennan (Cross)

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12 EXHIBITS RECEIVED INTO EVIDENCE:

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Plaintiff's 1

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1 stretch your legs, please feel free to do so.

2 If we could please have the courtroom come back to
3 order.

4 Mr. Brennan, go ahead, please. Thank you.

5 MR. BRENNAN: Thank you, Your Honor.

6 May it please the Court, and ladies and gentlemen
7 of the jury, let me reintroduce myself. My name is Sterling
8 Brennan. I practice law here in Salt Lake City. Yesterday
9 I introduced my colleagues, Michael Jacobs and Eric Acker of
10 the law firm of Morrison and Foerster. Mr. Jacobs and Mr.
11 Acker and I have been able to practice law together for many
12 years, and we're grateful that we have the opportunity to
13 represent Novell during the course of this trial. Also
14 yesterday I introduced Mr. Dana Russell, who is Novell's
15 senior vice president and its chief financial officer.

16 I do join Mr. Singer in expressing our
17 appreciation for your willingness to serve. We're mindful
18 of the sacrifice that you make. On Novell's behalf, we'll
19 do our very best to be efficient and clear in presenting the
20 evidence. And we believe, and as we intend to show, the
21 evidence will establish that Novell has not slandered, as
22 you've heard today, the claim of ownership to the UNIX
23 copyrights. In fact, Novell intends to show that no slander
24 could have occurred for a number of reasons.

25 First of all, Novell believes that to this day it

1 conditions set forth in this agreement. This is why this is
2 so important.

3 What you are going to likely hear are statements
4 being made by people who say this is what we thought the
5 deal was going to be. Executives who thought, well, this is
6 what we wanted to do, but that wasn't the deal. The deal
7 said on the terms and subject to the conditions set forth in
8 the agreement.

9 We need to look at what the words were. Seller
10 will sell, convey, transfer, assign and deliver to the
11 buyer -- Santa Cruz -- and the buyer will purchase and
12 acquire from the seller on the closing date -- keep in mind
13 I told you this deal is dated September 1995, it doesn't
14 close for three months. Then it says, all of the seller's
15 right, title and interest in and to the assets and
16 properties of seller relating to the business. Now that's
17 assets. Which assets? Identified on schedule 1.1(a).

18 So, again, if you want to find out what Novell
19 sold, we're going to have to look at schedule 1.1(a). To be
20 very clear about the point, Novell and Santa Cruz then
21 agreed, notwithstanding the foregoing -- that is as an
22 exception to what is being sold -- the assets to be so
23 purchased shall not -- let me underscore that, shall not
24 include those assets, called the excluded assets, set forth
25 on schedule 1.1(b).

1 Well, let's look at schedule 1.1(a) to see what
2 assets were and weren't sold. So if you were to -- and you
3 will have a chance in the jury room after the close of
4 evidence and you have a chance to deliberate, you will have
5 a chance to look at Schedule 1.1(a) and see what was sold.
6 Under intellectual property, and intellectual property
7 comprises things like copyrights, patents, trademarks, this
8 is the description of what Novell sold in terms of
9 copyrights or other intellectual property interests to Santa
10 Cruz. It says this, trademarks -- not copyrights,
11 trademarks -- which are completely different than
12 copyrights -- the trademarks UNIX and UnixWare as to the
13 extent held by seller for Novell. So the complete
14 description of the intellectual property, whether
15 copyrights, patents or trademarks, were just two things, the
16 UNIX trademark and the UnixWare trademark. That is the
17 entire description of the intellectual property.

18 There is no suggestion that copyrights are
19 transferred. If there be any doubt about that, one then
20 would look at the excluded assets to see what was not sold.

21 Well, let's look at the asset purchase agreement.
22 This now is schedule 1.1(b) entitled excluded assets. Now
23 I've superimposed on you part of that pie that I showed you.
24 Keep in mind that you will be able to verify this as you
25 look at the agreement. Novell did sell rights to develop

1 UnixWare and also permitted SCO to get revenues from the
2 sell of UnixWare. That is only half the pie. What Novell
3 retained was UNIX and the rights to revenues from UNIX.

4 So we look at what was not sold, what was
5 explicitly, expressly held back, it says this -- and I just
6 want to compare. Let me go back. This is what was
7 included. Notice Roman numeral V under the list of included
8 assets. Now we're going to flip the page and we're going to
9 look at excluded assets. Now, again, we're at intellectual
10 property. This is what was not sold, all copyrights. All
11 copyrights were not sold. There is no equivocation.
12 There's not, well, maybe some copyrights were, some weren't.
13 This agreement, black and white, says all copyrights are
14 excluded from the asset transfer.

15 And it continues, and all trademarks are excluded
16 except for two. What trademarks were not excluded? Well,
17 we looked at it before, UNIX and UnixWare trademarks. That
18 lines up completely with the list of included assets. There
19 is a perfect symmetry. The agreement says here's what is
20 being sold, the intellectual property, only two things,
21 trademarks for UNIX and UnixWare. We've looked at the next
22 schedule, what is excluded, everything, all copyrights are
23 excluded, and all trademarks are excluded except for two,
24 UNIX and UnixWare. It lines up perfectly. Then, in
25 addition, also to be clear, it says all patents are

1 (Recess)

2 THE COURT: Who will be your first witness?

3 MR. SINGER: Mr. Robert Frankenberg, Your HOnor.

4 THE COURT: You'll be handling that?

5 MR. SINGER: I will be handling that.

6 THE COURT: Thank you.

7 Anything, counsel, before we bring the jury in?

8 MR. SINGER: No, Your Honor.

9 MR. BRENNAN: No Your Honor.

10 THE COURT: Ms. Malley.

11 (WHEREUPON, the jury enters the proceedings.)

12 THE COURT: Mr. Singer, would you like to call

13 your fist witness, please.

14 MR. SINGER: Thank you.

15 We would call Mr. Robert Frankenberg.

16 THE COURT: Mr. Frankenberg, do you want to come

17 forward and I'll swear you in.

18 ROBERT J. FRANKENBERG

19 Having been duly sworn, was examined

20 and testified as follows:

21 THE WITNESS: Robert J. Frankenberg,

22 F-r-a-n-k-e-n-b-e-r-g.

23 DIRECT EXAMINATION

24 BY MR. SINGER

25 Q. Good morning, Mr. Frankenberg.

1 Would you please describe your educational background.

2 A. I have a degree in computer engineering from San Jose
3 State University, and I am a S.E.P. graduate of the Stanford
4 Graduate School of Business.

5 Q. Would you briefly summarize your employment background
6 before joining Novell.

7 A. I spent four years in the U.S. Air Force as a radar
8 computer technician, and then was at Hewlett Packard from
9 1969 to 1994. I started there as a manufacturing technician
10 and left as the person responsible for Hewlett Packard's
11 computer and networking business.

12 I left Hewlett Packard in late March of 1994 to become
13 the C.E.O. of Novell, and later became chairman of Novell.

14 Q. The position that you took at Novell when you joined
15 was that of chief executive officer, and then later you also
16 became chairman of the board?

17 A. That is correct.

18 Q. Can you briefly describe the major lines of Novell's
19 business at the point when you joined the company?

20 A. Novell's major business was NetWare, which is a network
21 operating system that allows people and still does to
22 connect personal computers together and share storage, share
23 disk storage and printing. At the time those were very
24 expensive and it became a very popular product to be able to
25 share those amongst many users.

1 wanted to do it in as short order as possible.

2 Q. With respect to the UNIX business, Mr. Frankenberg, was
3 it your intent to sell that business in its entirety?

4 A. Yes.

5 Q. Did selling UNIX include selling the UnixWare product
6 line?

7 A. Yes.

8 Q. Did selling UNIX include selling the UNIX copyrights?

9 A. Yes.

10 Q. Was UnixWare the current UNIX product that Novell was
11 licensing at that time?

12 A. Yes.

13 Q. Did there come a time when you directed certain of the
14 people that worked for you at Novell to take steps to have
15 that sale occur?

16 A. Yes.

17 Q. Was there a man named Duff Thompson who worked at
18 Novell?

19 A. Yes.

20 Q. What position did he have in 1995?

21 A. He was the senior vice president of business
22 development.

23 Q. Did you ask Mr. Thompson to take any steps to
24 accomplish the sale of the UNIX business?

25 A. Yes, I did.

1 Q. What direction did you give Mr. Thompson and others at
2 Novell?

3 A. I told them that we wanted to first of all sell UNIX
4 and UnixWare at a price that would be acceptable, that it
5 would go to a company that would be able to carry it forward
6 and that would have the means to do that and the ability to
7 do that. We wanted to affect a common UNIX operating system
8 across the entire spectrum of the Intel processor product
9 line, so that it would be compatible from the bottom of the
10 line to the top of the line, and thus create a competitor to
11 Microsoft's N.T. and other future operating systems.

12 Q. Did that mean you wanted to pick a seller who you
13 thought could do that?

14 MR. BRENNAN: Objection, leading the witness and
15 move to strike.

16 THE COURT: Overruled.

17 BY MR. SINGER

18 Q. Was there a gentleman by the name of Ed Chatlos that
19 also worked at Novell?

20 A. Yes.

21 Q. What role did he have in the transaction?

22 A. Ed was the primary day-to-day negotiator.

23 Q. Do you recall who he reported to?

24 A. I believe he reported to Duff.

25 Q. Did Mr. Thompson report to you?

1 A. Yes.

2 Q. Who was David Bradford?

3 A. David Bradford was the general counsel of Novell.

4 Q. What was Mr. Bradford's role in the transaction as
5 compared to that of Mr. Chatlos and Mr. Thompson?

6 A. Mr. Bradford would have overseen the effort. It was
7 his responsibility as general counsel, and he had many other
8 things on his plate, but he would have overseen especially
9 the legal aspects of it.

10 Q. In terms of negotiating the deal, who would have been
11 the responsible people for that?

12 A. The primary people negotiating the deal were Duff
13 Thompson and Ed Chatlos.

14 Q. Do you recall who became to buyer of the business, the
15 UNIX business?

16 A. Yes, Santa Cruz Operation, often referred to as SCO,
17 S-C-O.

18 Q. Did you have any conversations with any of the
19 principles of SCO?

20 A. I did, yes. I talked with Doug Michaels who was an
21 executive at SCO. I am pretty sure that it was at one of
22 the industry conferences that he and I both attended. We
23 talked about how attractive it would be to have a compatible
24 UNIX running on Intel from the bottom to the top of their
25 product line. He believed and he felt that SCO would be a

1 BY MR. SINGER

2 Q. Please look at Section 1.3 of the asset purchase
3 agreement on page 3, transfer of customers.

4 Under 1.3A, little I, it says it is the intent of the
5 parties hereto that all of the business and all of seller's
6 backlog, if any, relating to the business be transferred to
7 buyer. Accordingly, all parties agree to facilitate the
8 transfer of customers of the business from seller to buyer
9 following the closing.

10 Would you have transferred the UNIX customers to the
11 buyer if you were not selling the entire UNIX business?

12 A. No.

13 Q. Did all of the UNIX employees go over to Santa Cruz?

14 A. Most of them did. I believe some were laid off.

15 Q. Would you have done that if you were keeping the UNIX
16 business?

17 A. No.

18 Q. Would you look, please, at Section 1.6 of the asset
19 purchase agreement on page 5. This is called a license back
20 of assets.

21 Do you see that?

22 A. I do, yes.

23 Q. What is your understanding of a license back of assets?

24 A. The license back gave Novell the right to use the
25 intellectual property that had been sold to S-C-O in their

1 THE COURT: I will sustain the objection.

2 BY MR. BRENNAN

3 Q. You do have in front of you the asset purchase
4 agreement that has been admitted into evidence as Exhibit 1,
5 correct?

6 A. Yes.

7 Q. Mr. Singer asked you earlier to look at Section 1.1B
8 and the schedule thereunder, right?

9 A. Yes.

10 Q. Let's look again at the schedule, Section 1.1B, if we
11 might, of the asset purchase agreement.

12 Do you have that before you?

13 A. It is on the screen, yes.

14 Q. So of the excluded assets, if we were to look at the
15 second page under the heading Roman numeral five, it is
16 intellectual property, right?

17 A. Yes.

18 Q. As you read those words as you sit here today, you're
19 capable of reading it and they say that excluded is all
20 copyrights and trademarks except for the trademarks UNIX and
21 UnixWare, correct?

22 A. Correct.

23 Q. And also excluded are all patents, right?

24 A. Correct.

25 Q. Let me have you focus for just a minute on patents.

1 Q. I will try it again. I will try it again and I hope I
2 get it the same.

3 As you look at the words used in the asset purchase
4 agreement, section five, the excluded assets, you would
5 agree that those words state that all copyrights and
6 trademarks except for the trademarks UNIX and UnixWare are
7 excluded, correct?

8 A. That is what the document says, yes.

9 Q. As you sit here today would you agree that anyone else
10 who were to pick up the asset purchase agreement and look at
11 the excluded assets schedule, section five, intellectual
12 property, would you expect them to come to the same
13 conclusion that you did today, that in looking at the words
14 it would exclude all copyrights, right?

15 MR. SINGER: Objection, foundation.

16 May we approach, Your Honor?

17 THE COURT: We'll just go ahead and take a recess
18 at this point. 15 minutes.

19 MR. BRENNAN: Your Honor, just so we are clear,
20 are we going to get an answer to --

21 THE COURT: We will deal with the answer after I
22 have dealt with the objection.

23 MR. BRENNAN: Very well, Your Honor.

24 THE COURT: Ms. Malley.

25 THE CLERK: All rise for the jury, please.

1 Do you see that?

2 A. I do.

3 Q. And did you understand under the asset purchase
4 agreement if SCO which was granted the right to develop
5 UnixWare were then selling new licenses to UnixWare, we're not
6 talking about UNIX, we're talking about UnixWare. Are you
7 with me?

8 A. I'm with you.

9 Q. Okay. So with the UnixWare new licenses that
10 Novell would be entitled to a portion of those royalties, but
11 only if SCO hit a certain threshold of sales; did you
12 understand that?

13 A. Yes.

14 Q. And what did you understand that threshold to be?

15 A. As I recall, it was \$84 million.

16 Q. Do you know whether SCO ever sold \$84 million worth
17 of the UnixWare royalties?

18 A. Well, that would have been after I left. So
19 perhaps the same ruling earlier applies.

20 Q. And you don't know because you left the company;
21 right?

22 A. I don't know.

23 Q. Fair enough.

24 Then let's go with the next portion of the
25 resolution. And it bears particular attention:

1 Novell will retain all of its patents,
2 copyrights and trademarks, except for the
3 trademarks UNIX and UnixWare, a royalty-free
4 perpetual worldwide license back to UNIX and
5 UnixWare for internal use and resale of bundled
6 products exceeded with other miscellaneous
7 unrelated technology.

8 Do you see that?

9 A. I do, yes.

10 Q. So at the meeting of the board of directors, it was
11 specifically presented to the board that under the asset
12 purchase agreement Novell would retain all of its patents,
13 copyrights and trademarks with the sole exception of the UNIX
14 and UnixWare trademarks; correct?

15 A. That's what it says, yes.

16 Q. And these are accurate board minutes; right?

17 A. Yes.

18 Q. And these were prepared by Mr. Bradford, the
19 secretary of the corporation; right?

20 A. Yes.

21 Q. And you had a chance to review them and approve
22 them; correct?

23 A. Yes.

24 Q. And you did; right?

25 A. Yes.

1 Q. If we could look to the last page of the board
2 meetings. Under the section, adjournment, there's language
3 and a signature. Let's take a quick look at that. It says:
4 There being no further business to come before
5 the board, the meeting was declared adjourned by
6 Mr. Frankenberg at 1:30 p.m. Mountain Time.
7 And then there's a signature above the printed
8 words, David R. Bradford, secretary; correct?
9 A. Correct.
10 Q. Now, after that board of directors meeting, did you
11 then sign the asset purchase agreement?
12 A. Yes.
13 Q. Did you read every word of it before you signed it?
14 A. No, I did not.
15 Q. You were relying upon the advice of Mr. Bradford
16 and Mr. Sonsini among others; right?
17 A. Also Duff Thompson, also Ed Chatlos, the other
18 people on the team that were -- including the general manager
19 of the UnixWare business, I relied on all of those people,
20 yes.
21 Q. So thank you. Among others, Mr. Thompson,
22 Mr. Chatlos all recommended that you sign the asset purchase
23 agreement; correct?
24 A. Yes, they did.
25 Q. And as we look, the asset purchase agreement that

1 you signed and it was approved by the board of directors is in

2 the same form as Exhibit 1; right?

3 A. Correct.

4 Q. And it's that document that includes the schedule
5 of excluded assets; right?

6 A. Yes.

7 Q. And that schedule of excluded assets is essentially
8 the same as the resolution reached by the board of directors
9 where the board of directors unanimously approved a resolution
10 stating that there would be no Novell patents, no Novell
11 copyrights and no Novell trademarks except for UNIX and
12 UnixWare that would be transferred under the agreement;
13 correct?

14 A. That's what it says, yes.

15 Q. Thank you.

16 Now, after the asset purchase agreement was entered
17 into, the deal did not close for several months; correct?

18 A. Correct.

19 Q. And to your understanding, what was the reason for
20 the deal not closing immediately upon signing the asset
21 purchase agreement?

22 A. Well, I believe that there were quite a number of
23 things that had to be accomplished including figuring out who
24 would move from Novell to SCO, how that integration might take
25 place so the disposition of employees that weren't going to

1 Operation, is amended in the following respects.

2 Do you see that?

3 A. I do, yes.

4 Q. And what follows are certain changes or

5 modifications to the asset purchase agreement executed on

6 September 19, 1995; correct?

7 A. Correct.

8 Q. Now, we talked earlier about Schedule 1.1(a) in the

9 asset purchase agreement that listed the assets that Novell

10 was to transfer to Santa Cruz. Do you recall that?

11 A. I do, yes.

12 Q. And Amendment Number 1 does not modify the language

13 used in Schedule 1.1(a) to include copyrights, does it?

14 A. Not that I see here, no.

15 Q. There was no attempt made, to your understanding,

16 either by Novell or by Santa Cruz Operation given the nearly

17 three-month period to examine documents to then in Amendment

18 Number 1 come back and say words to the effect, oops, we made

19 some mistake. We intended to include Novell's copyrights to

20 UNIX, and we now should go back and include those. That was

21 never reflected in Amendment Number 1, was it?

22 A. It's not in there, no.

23 Q. Now let's consider on the other side of that coin,

24 if you will, that's the excluded assets. We looked earlier at

25 Schedule 1.1(b), which was the list of assets that were

1 excluded. Do you recall that?

2 A. Yes.

3 Q. And in the September 1995 asset purchase agreement

4 that you signed that we looked at and is consistent with the

5 board meeting, Novell excluded and Santa Cruz agreed to

6 exclude all copyrights and trademarks except for UNIX and

7 UnixWare; right?

8 A. Right.

9 Q. So then looking at the amendment, there was no

10 change in those exclusions, was there?

11 A. No, there was not.

12 Q. So is it correct, then, Mr. Frankenberg, that even

13 after the board meeting that was held at which the asset

14 purchase agreement was approved, after you and other members

15 of the board had a chance to thoroughly review the asset

16 purchase agreement and even after Mr. Sonsini and

17 Mr. Bradford, the legal advisors, apprised the board about

18 what was contained in the agreement and even after a nearly

19 three-month period to review it, neither Novell nor Santa Cruz

20 Operation chose to include UNIX copyrights in the asset

21 purchase agreement when Amendment Number 1 was executed;

22 correct?

23 A. Correct.

24 Q. Now, still if we could focus on Amendment Number 1,

25 I'd like us to look to, it's numbered Page 11, which is the

1 A. Yes.

2 Q. Now, Mr. Singer came back to you again and asked
3 whether or not it was the intent to withhold copyrights from
4 Santa Cruz under the asset purchase agreement. Let's look at
5 the last sentence in the resolution where it says, Novell
6 will retain.

7 So you're at the board meeting. We've talked about
8 what was presented. We talked about what you had a chance to
9 look at before. We talked about the legal advice that was
10 given. And we talked about how the terms are reviewed. We
11 talked about how you had a chance to review and this language,
12 quote:

13 Novell will retain all of its patents,
14 copyrights, and trademarks except for the
15 trademarks UNIX and UnixWare.

16 You see that; right?

17 A. Yes, I do.

18 Q. And that language is consistent with the language
19 in the asset purchase agreement; right?

20 MR. SINGER: Your Honor, I object to this.

21 Q. BY MR. BRENNAN: As signed on September 18th, 1995.

22 MR. SINGER: Objection; seeks the scope of recross,
23 simply repeats recross.

24 THE COURT: Overruled.

25 MR. BRENNAN: I'll re-ask the question because I

1 got muddled there. I'll try again.

2 THE COURT: Go ahead.

3 Q. BY MR. BRENNAN: The language that we just read in
4 the resolution is consistent with the language that's employed
5 in the September 19, 1995, asset purchase agreement regarding
6 exclusion of copyrights; correct?

7 A. Yes.

8 Q. So what the board reviewed and approved is
9 consistent with what you signed and what SCO signed; right?

10 A. Yes.

11 Q. Thank you. I appreciate your time.

12 THE COURT: Okay. Counsel, may this witness be
13 excused? By that I mean, he doesn't need to be worried about
14 being recalled?

15 MR. SINGER: I believe that's correct, Your Honor.

16 MR. BRENNAN: Yes, Your Honor. Thank you.

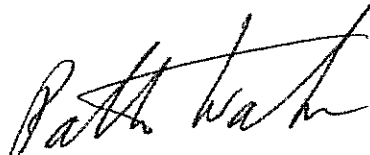
17 THE COURT: All right.

18 Mr. Frankenberg, you may go about your business.
19 You do not have to worry about being recalled as a witness in
20 this case. But I would ask you to, please, not discuss your
21 testimony with any other witness or in the presence of any
22 other witness or allow in any way your testimony as presented
23 here today to become part of another witness' understanding of
24 what has taken place in this trial.

25 THE WITNESS: I'll do that, Your Honor.

C E R T I F I C A T E

I hereby certify that the foregoing matter is
transcribed from the stenographic notes taken by me and is a
true and accurate transcription of the same.



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DATED: 3-9-2010

EXHIBIT No. 16

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2 DISTRICT OF UTAH
3 CENTRAL DIVISION
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9 NOVELL, INC., a Delaware)
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15
16 BEFORE THE HONORABLE TED STEWART

17 -----

18 March 10, 2010

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21 Jury Trial

22 Volume II

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247 U.S. Courthouse

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350 South Main Street

Salt Lake City, Utah

24

(801) 328-3202

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1 THE COURT: Ms. Malley, please get the jury.

2 Is Mr. Thompson in the courtroom? Will you be
3 sending someone for him so that we can move quickly?

4 MR. SINGER: Yes, we will.

5 (WHEREUPON, the jury enters the proceedings.)

6 THE COURT: Good morning, ladies and gentlemen of
7 the jury. I want to apologize to you. As I indicated in
8 one of the preliminary instructions, on occasion you may
9 find yourselves waiting in the jury room while we deal with
10 matters that we have to. We will try to keep those delays
11 at a minimum, but it will happen from time to time during
12 the course of the trial.

13 Again, I have to ask you, ladies and gentlemen,
14 whether or not any of you violated the very specific
15 instruction that you have been given in reference to your
16 conduct, particularly that conduct outside of the
17 courthouse?

18 All right. Once again, you passed the test.

19 Mr. Singer, would you like to call your next
20 witness?

21 MR. SINGER: Thank you, Your Honor.

22 We would, and our next witness is Mr. Duff
23 Thompson.

24 ROBERT DUFF THOMPSON

25 Having been duly sworn, was examined

1 and testified as follows:

2 THE WITNESS: Robert Duff, D-u-f-f, Thompson.

3 DIRECT EXAMINATION

4 BY MR. SINGER

5 Q. Mr. Thompon, do you generally respond to the name Duff?

6 A. Yes.

7 Q. If there are references to Duff that is generally
8 referring to you?

9 A. Yes.

10 Q. Briefly summarize your educational background.

11 A. Undergraduate degree in economics, master's of business
12 administration and a J.D.

13 Q. What institution?

14 A. Brigham Young University.

15 Q. All three?

16 A. Yes.

17 Q. Would you please summarize your employment after
18 school.

19 A. I worked in the law firm of Moyle & Draper for a few
20 years. I went to the firm of Callister Nebeker &
21 McCullough. It was originally Greene Callister & Nebeker.
22 I worked there for a number of years. Then I was hired as
23 general counsel for Word Perfect Corporation.

24 Q. For how long were you at Word Perfect?

25 A. From 1986 until 1994.

1 2005 with Santa Cruz representatives about the transaction?

2 A. Did you say 2005?

3 Q. I did. I meant 1995.

4 A. There were a series, a lot of meetings in the summer of
5 1995 between Novell and SCO in Palo Alto, Los Gatos, San
6 Jose, all over the place in the bay area.

7 Q. Do you recall a meeting in Palo Alto with the Santa
8 Cruz executives where you discussed what would Novell be
9 selling to Santa Cruz?

10 A. Yes. I have in my mind a specific instance at the SCO
11 counsel's offices. SCO was represented by a firm by the
12 name Brobeck, and I remember meeting on the terrace of their
13 offices with Alok Mohan and Jim Wilt and other members of
14 our team to talk about the deal.

15 Q. At that time do you recall what you said regarding how
16 much of the UNIX business was going to be sold to Santa
17 Cruz?

18 A. Well, my recollection is exactly the same as I have
19 given, that we're selling you all of the business, lock,
20 stock and barrel, the whole thing.

21 Q. By the whole business, did that include both UNIX and
22 UnixWare?

23 A. Yes.

24 Q. What was your understanding as to whether the
25 copyrights were also being sold?

1 A. Well, it was the whole business. We were giving them
2 source code, all of the manuals, the customer lists, we were
3 giving them the whole business. I assumed and I understood
4 that we were giving them the copyrights as well.

5 Q. Would holding back the copyrights have been consistent
6 with your instructions from Mr. Frankenberg, the CEO?

7 A. I received no instructions from Bob Frankenberg to hold
8 back the copyrights. Indeed, I never heard anyone in the
9 course of those negotiations for several months talk about
10 holding back the copyrights.

11 Q. Did you in turn ever instruct anyone on the deal to
12 hold back the copyrights?

13 A. I did not.

14 Q. What was Mr. Ed Chatlos' role in the transaction?

15 A. Well, Ed was the primary negotiator. Ed actually lived
16 back in New Jersey. He had worked with AT&T back in
17 the '80s and had worked with USL, when it became USL, and
18 then moved over to Novell when Novell purchased USL. Ed had
19 been part of the AT&T and USL and Novell world for years and
20 years and years.

21 It turns out, when I was given my assignment as the
22 head of corporate development, Ed was part of my staff
23 located in New Jersey. Ed was the natural individual to be
24 the chief negotiator for this transaction. By chief
25 negotiator, I mean I expected Ed to be on that case every

- 1 A. Sure. I mean, that was the purpose of the A.P.A.
- 2 Q. Was Santa Cruz --
- 3 A. The A.P.A. is the asset purchase agreement. We began
4 to refer to it as the A.P.A.
- 5 Q. Was Santa Cruz to receive the entire UNIX business
6 except the royalties on these licenses -- that was not well
7 phrased.
- 8 When you decided on this payment mechanism, did that
9 change the fact that you were going to sell the entire UNIX
10 business to Santa Cruz?
- 11 A. When we decided on the payment system?
- 12 Q. Yes.
- 13 A. No. The transaction never changed. Sell the business
14 was the order of the day. That was our instruction, sell
15 the business. We were just trying to figure out how to pay
16 Novell and its shareholders a reasonable value for the sale
17 of this business.
- 18 Q. Now, were you personally involved in the transaction up
19 to the date that the A.P.A. was signed?
- 20 A. Yes.
- 21 Q. In fact, beyond that, to the date it was closed in
22 December --
- 23 A. Yes.
- 24 Q. -- of 1995?
- 25 A. Yes.

1 Q. I would like to give you a book of exhibits.

2 Mr. Thompson, Exhibit 1 which is already in evidence is
3 the asset purchase agreement, the so-called A.P.A. Just so
4 that we have some identification of what is in Exhibit 1, do
5 you see on the first page you have the asset purchase
6 agreement that is before you?

7 A. Yes.

8 Q. Then if we go to page 49, do you see Mr. Mohan's
9 signature on behalf of Santa Cruz Operation and the
10 signature of Bob Frankenberg on behalf of Novell?

11 A. Yes.

12 Q. Then after that there are certain schedules of assets.

13 Do you see that?

14 A. Yes.

15 Q. Then after that --

16 A. Yes, lots of schedules, actually.

17 Q. After that there are two amendments to the back of the
18 agreement.

19 Do you see that?

20 A. There is amendment one.

21 Q. At the very end, the last couple of pages, there will
22 be amendment number two.

23 A. Okay. Yes, there is amendment two.

24 Q. Going back to the A.P.A., you are familiar with this
25 document as the person in charge of selling the company?

- 1 A. Yes.
- 2 Q. Would you turn to the list of the assets being sold on
3 Schedule 1.1A.
- 4 A. Yes.
- 5 Q. If we blow up that schedule on the screen here so that
6 it is a little more visible, do you understand this to be,
7 subject to the exclusions which we will talk about in a
8 moment, the assets which were being sold as a part of the
9 transaction?
- 10 A. Did you say that they were subject to the exclusions?
- 11 Q. Well, we'll turn to the schedule separately of the
12 excluded assets, but did you understand that this schedule
13 of 1.1A were the assets that were being sold?
- 14 A. Yes. These are all the included assets, yes.
- 15 Q. Did you understand this to represent the entire UNIX
16 and UnixWare business?
- 17 A. I did.
- 18 Q. Was it your understanding that the copyrights were
19 included in this sale of the UNIX and UnixWare business?
- 20 A. I understood that ownership of UNIX was the ownership
21 of the code, the ownership of UNIX, ownership of the
22 business, ownership of the clients, ownership of the
23 accounts, all of those things were what we were transferring
24 to SCO.
- 25 Q. That pertained both to the current UnixWare, the source

1 code as well as the older products of UNIX?

2 A. We called out UNIX and UnixWare. Paragraph one, UNIX
3 and UnixWare.

4 Q. Could we now turn to Section 1.1B.

5 Were there certain assets which you understood Novell
6 was intent on retaining from the transaction --

7 A. Yes.

8 Q. -- and not selling?

9 A. Yes.

10 Q. What was your understanding of what those were supposed
11 to be?

12 A. The NetWare and other related Novell technologies.
13 NetWare was the crown jewel of Novell. In this transaction
14 we wanted to make sure that it was clear that even if there
15 were some bits and pieces of the NetWare code that were
16 going over as a part of the new merged product or any of
17 those sorts of things, there was absolutely no question but
18 that Novell was retaining the rights to the ownership of
19 that. They were keeping that and reserving that back in
20 this deal.

21 Q. If we look at the items on the first page of this
22 schedule, do most of those concern NetWare?

23 A. Well, yes, all with the exception of Tuxedo were
24 NetWare items.

25 Q. Was Tuxedo also not being sold?

1 A. Tuxedo was not being sold. That was a Novell item.

2 Q. On the next page of this list of excluded assets,
3 referring now to the old language on Section 5A before it
4 was changed, where it says all copyrights and trademarks,
5 was it consistent with your understanding of the deal that
6 the UNIX copyrights would be excluded?

7 A. No. My understanding of the use of this phrase here
8 was the NetWare copyrights and trademarks.

9 Q. That is based on the deal which you negotiated?

10 A. Yes.

11 Q. And what the other people that reported to you
12 negotiated?

13 A. Yes.

14 Q. At the time that this was drafted, did any of the
15 lawyers come to you and say, Mr. Thompson, we have decided
16 to put in language in this schedule to hold back the UNIX
17 copyrights?

18 A. No. That did not happen.

19 Q. Without the UNIX copyrights would Santa Cruz be able to
20 operate the software business that they were buying?

21 MR. ACKER: Objection, calls for a legal
22 conclusion, Your Honor.

23 THE COURT: I'll overrule the objection.

24 THE WITNESS: It is hard for me to imagine any
25 instance in which we are selling them the entire business,

1 to go forward with this business in the future, without
2 giving them the underlying intellectual property rights that
3 they needed to do so.

4 BY MR. SINGER

5 Q. I would like you to tell me, if you recall, if there
6 was any license to Santa Cruz that was negotiated as a part
7 of the A.P.A., so that instead of owning the copyrights they
8 would just be given a license through this agreement to make
9 use of them?

10 A. To the UNIX products?

11 Q. Yes.

12 A. There was no such license. This was a sale. We
13 referred to it as an acquisition, not a license. There was
14 to be a license back for the NetWare technology, but not for
15 the UNIX technology.

16 Let me be clear. There was to be a license back from
17 Novell to SCO to be able to use the NetWare technology in
18 the future, but there was no such license for the UNIX
19 software and copyrights to SCO. It was a sale. We were
20 selling it to SCO.

21 Q. Was there a license back from Santa Cruz to Novell so
22 that Novell would have certain rights to use the UNIX assets
23 that were being sold to Santa Cruz?

24 A. Yes. We contemplated at the time the sale took place,
25 we contemplated that there would be a need inside Novell --

1 Q. Was this part of the assets being sold to Santa Cruz?

2 A. Yes.

3 Q. Claims, would that include legal claims?

4 A. Yes.

5 Q. Arising after the closing date, and that refers to the
6 date when the UNIX business is going over to Santa Cruz?

7 A. Yes. That was my understanding.

8 Q. So all of those claims would be going over with the
9 business; is that correct?

10 A. Yes.

11 MR. ACKER: Objection, leading. A question that
12 ends with is that correct is usually a leading question.

13 THE COURT: I will sustain the objection.

14 BY MR. SINGER

15 Q. Was one of the assets that the seller was getting --
16 let me rephrase that.

17 Did Santa Cruz's purchase include legal claims that it
18 would have against parties that were connected with the
19 business?

20 A. It was the intent of the parties as part of the
21 negotiations that post-closing, once the closing had
22 occurred, that all of these claims would now be SCO's
23 claims.

24 Q. Look at Roman numeral three.

25 A. Okay.

1 Q. Was this also part of the assets being sold to Santa
2 Cruz, all of sellers rights pertaining to UNIX and UnixWare
3 under any software development contract, licenses and other
4 contracts to which seller is a party, or by which it is
5 bound and which pertain to the business, to the extent such
6 contracts are assignable, including without limitation --
7 then there are a number of things that are listed underneath
8 that.

9 A. That is right. Our intent in that particular provision
10 was to try to enumerate all of the things that we were
11 trying to sell them as part of the business.

12 Q. Are you aware that there were agreements for software
13 development with companies that went back all the way to the
14 AT&T days, that had gone from AT&T to Novell and now from
15 Novell to SCO?

16 A. I was aware of that.

17 Q. Are you aware that one of those were agreements that
18 allowed IBM to have access to the UNIX source code for its
19 development work?

20 A. I was aware of that.

21 Q. Do you have an understanding as to whether or not that
22 agreement would be one of the ones under this section, Roman
23 numeral three?

24 A. Yes, that would be one of the agreements. It was one
25 of the -- I mean, if you want to look specifically, and if

1 Amendment 2. Do you remember that series of questions from
2 Mr. Singer this morning?

3 A Yes.

4 Q Now, what I've handed you, Novell Exhibit A1, is an APA
5 that does not include either Amendment 1 or Amendment 2;
6 correct?

7 A I'm thumbing through it right now.

8 Q Take your time.

9 A It appears to be just the APA agreement. Is that right?

10 Q I'm going to represent that to you, but if you don't
11 trust me, please take a look.

12 A I think that's what it is. I think it's just the APA
13 agreement.

14 Q Okay. So we get the chronology straight, the APA itself
15 was signed and approved by the board of directors of Novell in
16 September of 1995; got that right?

17 A That's correct, Mr. Acker.

18 Q And you weren't on the board; correct?

19 A I was not.

20 Q And it was the board of Novell that had to approve that
21 deal; right?

22 A That is correct.

23 Q And the transaction, although it was approved in
24 September of 1995, actually didn't get closed, and the bill of
25 sale was not actually signed until December of 1995; is that

1 right?

2 A That's correct.

3 Q And at the signing in December of 1995 there was an

4 Amendment 1 that was prepared during the several months

5 between September of '95 and December of '95; right?

6 A Yes. We had the technology licensing agreement, the bill

7 of sale and the Amendment 1 that were all signed in December

8 of 1995.

9 Q And you signed the Amendment No. 1; right?

10 A Yes.

11 Q And you signed the bill of sale?

12 A Yes.

13 Q And you signed the technology licensing agreement;

14 correct?

15 A That's correct.

16 Q And just so the chronology is set, September of '95 APA

17 is signed and approved by the board; December of 1995

18 Amendment No. 1 is done; correct?

19 A Yes.

20 Q And then you -- you're out of the process. You leave the

21 company; right?

22 A Well, not right then, but within a couple of months I was

23 gone.

24 Q But in terms of dealing with the APA, your last dealing

25 with the APA until you were at Santa Cruz and seeing issues

1 arise was in December of '95; fair?

2 A I think that's a fair statement, yes.

3 Q And fair to say that actually after the deal was signed

4 in September of '95, you sort of became much less involved in

5 the process because you began working on the sale of

6 WordPerfect by Novell; correct?

7 A That's correct.

8 Q So really your real involvement in the negotiations

9 leading up to the APA occurred sometime before September of

10 '95. Is that fair?

11 A Well, by the real involvement, do you mean the majority

12 of the time that I spent on this was prior to the signing of

13 the APA, I would agree with that. I spent some time after the

14 signing of the APA in continuing discussions with the team, Ed

15 Chatlos and others, who were continuing to work on this matter

16 to get it closed. But my time, the time in California, the

17 time meeting with AP -- with SCO and with Alok Mohan and the

18 others, was primarily prior to this time.

19 Q And can you place a time around when it was or how far in

20 advance of September of 1995 this meeting in Palo Alto you

21 referred to was?

22 A Well, there were a number of meetings. I don't mean to

23 suggest there was a single meeting in Palo Alto. The

24 reference I had before was to a particular meeting on the

25 terrace of the law firm of Brobeck in which I was talking to

1 Alok Mohan and Jim Wilt and Jeff Seabrook from their company,
2 and I was there with Ty Mattingly and Ed Chatlos.

3 Q Can you put a date on it?

4 A I don't have a date. It was sometime in the Summer or
5 late Summer, either July or August of 1995.

6 Q So it was --

7 A Could have been early September even.

8 Q So it was at least several weeks before the APA was
9 completed?

10 A Best of my recollection, it was prior -- it was sometime
11 in the Summer of 1995.

12 Q And you weren't involved in the day to day face-to-face
13 negotiations in the APA; correct?

14 A Well, yeah. Occasionally I was there on a day to day
15 basis. I'd be there for two or three days, and then I would
16 go on to other things.

17 Q But Ed Chatlos --

18 A Ed Chatlos was there every day as far as I knew. If
19 there was a negotiation session going on with the team, Ed
20 Chatlos was there.

21 Q And you hired lawyers to assist you in this process;
22 correct?

23 A Yes. We had outside counsel and inside counsel working
24 on this project.

25 Q And inside counsel was Mr. Bradford; correct?

1 A No. No. Actually it wasn't Dave. It was someone on his
2 staff and someone from New Jersey, whose name I can't
3 remember. But there was a gentleman from New Jersey that came
4 out with Mike DeFazio, who was the executive vice-president
5 over the Unix Group within Novell, and then there were other
6 lawyers of the team with Novell. Dave Bradford really wasn't
7 there very much.

8 Q And when you were -- when the detailed negotiations were
9 taking place, you hired Wilson Sonsini to act as your outside
10 counsel; correct?

11 A Dave Bradford -- Dave Bradford hired Wilson Sonsini.
12 That wasn't my role. That was David's --

13 Q That's who represented Novell in the transaction was the
14 outside counsel?

15 A Yes.

16 Q And Tor Braham was the lead lawyer for that team;
17 correct?

18 A Tor Braham was a participant. There were a number of
19 other parties that were draftsmen in that process.

20 Q And because you were not acting as a lawyer at Novell in
21 this period of time, you relied on Novell's outside counsel at
22 Wilson Sonsini to do the detailed drafting of the APA
23 agreement; correct?

24 A Wilson Sonsini was the principal outside firm, yes.

25 Q And you had confidence in the Wilson lawyers, including

1 Mr. Braham; correct?

2 A They were our lawyers.

3 Q And you had confidence in them; correct?

4 A They were our lawyers. I mean were they perfect? No.

5 And it was -- listen. Are you asking me were they absolutely

6 dead-on on everything they ever did? I would say they were

7 better than average.

8 Q So you had confidence in them; correct?

9 A I had confidence in them.

10 Q Now, let's take a look at the APA. And let's back up.

11 You testified --

12 THE COURT: Going to offer it as an amendment --

13 excuse me -- as an exhibit, your A1?

14 MR. ACKER: Yeah. I would move to have A1 admitted,

15 Your Honor. It is A1, yes.

16 THE COURT: Mr. Singer?

17 MR. SINGER: Our only objection is that it's already

18 in evidence as part of SCO Exhibit 1.

19 THE COURT: The Court will admit Exhibit A1.

20 (Defendant's Exhibit A1 received in evidence)

21 Q (BY MR. ACKER) Now, when you were describing the strategy

22 leading up to the decision to select Santa Cruz, not SCO

23 that's the Plaintiff in this case, but Santa Cruz to be the

24 entity to buy portions of the Unix business, you said that you

25 were concerned because they didn't have enough cash at some

1 point. Is that right? That became a concern?

2 A Yeah. The Novell team, Bob, the rest of us, Jim Tolonen,
3 understood that SCO did not have enough cash to just simply
4 buy this outright.

5 Q But the initial plan was to sell the entire business
6 outright for cash; correct?

7 A Well, the plan was to sell the whole business period. It
8 wasn't a question of -- maybe that's the issue that I'm trying
9 to suggest. There was never a provision in the instructions
10 that I received go sell this for cash. The instruction was go
11 sell this lock, stock and barrel. Sell the business. It was
12 not go get cash for this business. It was go sell this.

13 Q And at a point during the negotiations it became clear
14 that Santa Cruz didn't have enough cash, didn't have close to
15 \$300,000,000 in order to buy the business; right?

16 A That's right. They did not have \$300,000,000 cash.

17 Q And because of that, the deal was restructured into the
18 structure that you've described for us, where one portion of
19 it was the payment of \$6,000,000 of stock; right?

20 A The deal was not restructured, Mr. Acker.

21 Q Well, the deal became the giving of \$6,000,000 -- or
22 6,000,000 shares of stock; correct?

23 A The way to pay for this was part stock, which was
24 limited -- our original estimate was that they'd be able to
25 pay for more of it with stock. But it was Novell's issue that

1 A Yes.

2 Q Now, let's take a look at Novell Exhibit A1, which is the
3 APA without Amendment 1 and not Amendment 2. And if we could
4 go to Schedule 1.1(a), please. Now, in questions -- in
5 response to questions from Mr. Singer you said that this is a
6 schedule -- this is an asset purchase agreement, so it's --
7 the lawyers need to say what's in the deal and what's out of
8 the deal; right?

9 A Yes.

10 Q So you have a list, 1.1(a) and that's what is in the
11 deal; correct?

12 A Yes.

13 Q And then the next couple pages after that are Schedule
14 1.1B, which is what's not in the deal; correct?

15 A Yes.

16 Q And the reason for having those two schedules is so that
17 everybody knows what's being sold in 1.1(a) and what's not
18 being sold in 1.1(b); correct?

19 A Yes.

20 Q And what we see in schedule 1.1(a) is a listing of what
21 was included; correct?

22 A That's correct.

23 Q And you agree that what is listed in schedule 1.1(a) is
24 what was included in that, what was sold in the APA that went
25 from Novell to Santa Cruz in 1995; right?

1 A That's what 1.1(a) is, included assets.

2 Q If we can take a look at section 1.1(a) paragraph Roman
3 Numeral five. And this again is the section of the included
4 assets that is referencing intellectual property; right?

5 A Yes.

6 Q And what it says is what is included in the deal is
7 trademarks Unix and UnixWare to the extent held by seller,
8 excluding any compensation seller receives with respect of the
9 license granted in X/Open regarding the Unix trademark;
10 right?

11 A Yes.

12 Q That's it; right?

13 A Well, no. That's not it.

14 Q In the paragraph --

15 A Oh, in the paragraph. But, no, that's one of many
16 included assets.

17 Q In the paragraph in the included assets it says
18 intellectual property, all that's listed is trademarks Unix
19 and UnixWare; right?

20 A I see that, yes.

21 Q And you would agree with me that copyrights are
22 intellectual property?

23 A I would agree that copyrights are intellectual
24 property.

25 Q And in the APA that was executed in September of '95 and

1 closed in December of '95, in the included assets section
2 referring to intellectual property, the only intellectual
3 property mentioned is trademarks Unix and UnixWare; right?

4 A In paragraph five, but all the rest of that assets
5 provision talks about intellectual property.

6 Q But in the intellectual property section of 1.1(a)
7 there's no mention of copyrights. Would you agree with
8 that?

9 A I would agree that it says what it says.

10 Q Okay. Let's go to the corresponding section 1.1(b)
11 paragraph five. Now, schedule 1.1(b) -- so to make it clear,
12 this is an asset purchase agreement, and 1.1(a) is what is
13 sold and 1.1(b) is what is not sold, that is what is retained
14 by Novell; correct?

15 A Correct.

16 Q And there's a corresponding paragraph in section 1.1(b),
17 again, Roman Numeral five, that says intellectual property;
18 right?

19 A Yes.

20 Q And it reads in the first section-A what is --

21 MR. SINGER: Your Honor, I object. I think this
22 should be identified as to prior or replaced language.

23 MR. ACKER: I'll be perfectly clear.

24 Q (BY MR. ACKER) We're talking about the APA that was
25 signed -- or signed by the board of directors in September of

1 1995; right? That's what we're talking about?

2 A That is this document, yes.

3 Q And we're not talking about anything that happened after.

4 I'm focusing on September of 1995, okay?

5 A Okay.

6 Q In the intellectual property section of what was

7 excluded, 1.1(b), in (a), what's listed there is all

8 copyrights and trademarks, except for the trademarks Unix and

9 UnixWare; correct?

10 A Yes.

11 Q And that was what was excluded from the sale; correct?

12 A Well, I see that.

13 Q You see those words?

14 A I don't agree with it.

15 Q I understand you don't agree with it. I heard your

16 testimony, but you see the words, and those are the words in

17 the deal?

18 A I see the words.

19 Q Okay. And there's some symmetry between what we saw in

20 the included assets 1.1(a) paragraph five that said the

21 trademarks Unix and UnixWare went with the deal and this

22 portion of 1.1(b), the excluded assets, that say all the other

23 copyrights and trademarks stayed, except for trademarks Unix

24 and UnixWare, which are included in the included assets

25 1.1(a); right?

1 A Their symmetry? Well, I see that Unix and UnixWare
2 trademarks are mentioned in both.

3 Q And now you testified on direct that when you say -- when
4 you read the words all copyrights as being excluded, you
5 thought that just meant copyrights to NetWare; right?

6 A NetWare and other Novell core products, that's right.

7 Q Can you show me where in this section, intellectual
8 property, paragraph 5(A) of the excluded assets, it says
9 NetWare?

10 A Well, it doesn't say that.

11 Q I'm sorry?

12 A It does not say that.

13 Q So in the section talking about intellectual property and
14 what's excluded from the deal, there is no mention of NetWare;
15 right?

16 A Mr. Acker, if you refer to the whole previous page, the
17 entire previous page, it mentions nothing but NetWare and
18 TUXEDO. And so what I am -- I guess my answer to you is this.
19 The reason that our understanding, our negotiating team's
20 understanding, that -- on this provision is because the entire
21 page preceding that line talks about NetWare.

22 Q And my question was really pretty simple. In the section
23 of the excluded assets from the deal that talk about
24 intellectual property, it says all copyrights, and there's no
25 mention of NetWare?

1 A And my answer is equally simple. That made no sense. I
2 knew what the deal was. And the idea of delivering source
3 code, the idea of delivering these mountains of documentation
4 of this product, the entire business of Unix, to a company and
5 to somehow then suggest that you don't own the ability to use
6 that, just seems inconsistent. So that's my answer.

7 Q So it's your opinion that's inconsistent, but you don't
8 disagree that what the document actually says is that
9 copyrights were excluded from the deal?

10 A I don't disagree that this paragraph says copyrights are
11 excluded assets, but I do disagree that that had any bearing
12 on the transaction that we negotiated, the words that I said
13 to SCO, the words that I heard from Bob Frankenberg, and the
14 deal that we cut.

15 Q So it's your testimony that the actual language of the
16 agreement saying what is excluded have no bearing on what was
17 actually the deal was?

18 A It is not my testimony that the words have no bearing.
19 It is my testimony that these words do not accurately reflect
20 the transaction that I negotiated.

21 Q So now we're getting down to it. It's your testimony
22 that the actual deal, what was documented, what was signed,
23 what was approved by the board of directors, is inconsistent
24 with what you thought the deal was?

25 A It is my testimony that the APA is incomplete in that

1 business, and I believe your testimony was it wouldn't make
2 any sense. Do you recall that?

3 A It would not make any sense.

4 Q Right, because you were selling the business?

5 A Yes.

6 Q From the Santa Cruz perspective, however, would it make
7 a difference whether they were getting a company with the
8 copyrights as opposed to without the copyrights?

9 A Okay.

10 Q Whether they were the getting the UNIX business with
11 the copyrights and without the copyrights?

12 A So are you asking me to testify what my belief was at
13 the time we were negotiating it --

14 Q I'm asking --

15 A -- or just in general now?

16 Q Well, let's talk about at the time you were negotiating
17 it.

18 A At the time I was negotiating it, I did not represent
19 SCO's interest in that, I represented Novell's interest in
20 that, and that was something we proffered as part of the
21 sale was the entire business.

22 Q Did you do it on -- did you have any belief at that
23 time that it would make any sense to offer the entire UNIX
24 business to Santa Cruz but then say, well, you're not going
25 to get the copyrights?

1 A No.

2 Q In fact, can you tell me whether or not you would have
3 gone about selling the business to Santa Cruz, the UNIX and
4 UnixWare business, and not tell the purchaser that you are
5 going to withhold the copyrights? Is that something that
6 you would do?

7 A Well, it is an inconsistency. If there was something
8 that we were withholding, we would have told them. We
9 wouldn't have tried to sneak it in somehow on the last page
10 of a document. We would have actually had that discussion.
11 So the answer is no, I would not have the done that.

12 MR. SINGER: Thank you.

13 THE COURT: Mr. Acker.

14 MR. ACKER: One question, Your Honor.

15 THE COURT: Go ahead.

16 MR. ACKER: Can I do is from here?

17 THE COURT: You may.

18 RE CROSS-EXAMINATION

19 BY MR. ACKER:

20 Q Sir, to your knowledge, did the lawyers and business
21 people at Santa Cruz have the opportunity to read the
22 included and excluded asset schedule before they agreed to
23 the APA?

24 A Yes.

25 MR. ACKER: That's all I've got.

1 forward?

2 EDWARD CHATLOS,

3 Having been duly sworn, was examined

4 and testified as follows:

5 THE CLERK: If you would please state and spell
6 your name for the Court.

7 THE WITNESS: Edward S. Chatlos. C-h-a-t-l-o-s.

8 DIRECT EXAMINATION

9 BY MR. NORMAND:

10 Q Good morning, Mr. Chatlos.

11 A Good morning.

12 Q Could you summarize your educational background?

13 A Yes. I have a bachelor's of science degree in
14 electronic engineering technology. A master's of science
15 degree in computer science from Johns Hopkins.

16 Q Can you briefly summarize your employment before you
17 joined Novell?

18 A After my bachelor's degree, I joined Western
19 Electric --

20 THE COURT: Mr. Chatlos, can I get you to scoot
21 forward, and also make certain the microphone is closer to
22 you.

23 THE WITNESS: Is that better?

24 THE COURT: I think so, yes.

25 THE WITNESS: After my bachelor's degree, I went

1 to Western Electric. Stayed there for about nine months.
2 And then left Western Electric, got my master's at John
3 Hopkins. Came back to Western Electric, and stayed there
4 for about nine months moving to the microprocessor product
5 management group, department management for software systems
6 there. Left after about a year and a half and went to the
7 AT&T microelectronic -- I'm sorry, the UNIX group in AT&T.
8 Stayed there until '87. Then, in '87, I moved to London and
9 did software licensing for UNIX in Europe for three years.
10 I came back and did business development, business planning
11 for UNIX with AT&T.

12 Q When did you join Novell?

13 A Right after the sale of UNIX to Novell by AT&T, 1993
14 maybe.

15 Q And what position did you assume?

16 A Senior director of strategic relationships.

17 Q What were your, in brief, responsibilities?

18 A I managed the big company relationships, like Computer
19 Associates, how we partnered with them.

20 Q How long were you at Novell?

21 A Through 1995, the end of 1995.

22 Q So when did you leave?

23 A Actually it was January 5th of 1996.

24 Q Why did you leave?

25 A I had an offer from AT&T and I thought it was a good

1 offer, so I left for that reason.

2 Q Did Novell want you to leave?

3 A No.

4 Q Did you have a chance to work with a man named Duff
5 Thompson during your time at Novell?

6 A Yes.

7 Q In what capacity?

8 A I worked in his organization at one time and then
9 reported to him towards the end.

10 Q Over what time span did you report to Mr. Thompson?

11 A Since I joined Novell, which was, again, '93 through
12 January of '96.

13 Q Now as of the beginning of 1995, what were the major
14 lines of business at Novell?

15 A You certainly had Netware. That was the biggest one.
16 You had UNIX. Some smaller lines of business, like
17 documentation training, WordPerfect, and may be others.

18 Q Did there come a time when Mr. Thompson -- Duff
19 Thompson spoke with you about Novell's intent to sell the
20 UNIX and UnixWare business?

21 A Yes.

22 Q Do you recall, approximately, when that occurred?

23 A In the May time frame of 1995.

24 Q What did Mr. Thompson tell you about his intent
25 regarding the sale of these assets?

1 A He said he wanted to sell the entire UNIX business to a
2 buyer. I am not sure if he said SCO at that time.

3 Q Did you have an understanding at that time as to why
4 Novell had decided to sell this entire business?

5 A I think so. It really was about Novell focusing on
6 their core NetWare products given all the competition coming
7 around them.

8 Q When you say you think so, did you discuss this issue
9 with Mr. Thompson?

10 A I don't believe so.

11 Q Did you discuss it with anyone else?

12 A I don't remember.

13 Q What role did Mr. Thompson ask you to play with respect
14 to the sale of these assets?

15 A He asked me to lead the negotiations for selling the
16 business.

17 Q Did you have a view at that time as to why he had asked
18 you to play that role?

19 A I think it was my background. I was certainly the UNIX
20 expert, business expert. I had done a lot of negotiation
21 before. So I think that was the reason.

22 Q As of that time, late 1995, how many transactions would
23 you estimate you were part of negotiating?

24 A I don't know, anywhere between 30 and 50. I'm not
25 sure. Some small, some very big.

1 Q Was there any effort within Novell around the time you
2 learned of this intent to find a proposed purchaser?

3 A Yes, there was.

4 Q Did you come to a decision as to who an appropriate
5 purchaser would be?

6 A Yes, SCO.

7 Q On what basis did you make that decision?

8 A Primarily their market reach, their experience in UNIX,
9 their staffing. It was a really good fit. They were
10 focused on binary sales, so that was an important thing as
11 well.

12 THE COURT: Mr. Chatlos, may I ask that you slow
13 down a little bit, primarily for the court reporter.

14 MR. NORMAND: Thank you, Your Honor.

15 BY MR. NORMAND:

16 Q Now did there come a time when you took Mr. Thompson up
17 on his request and began to negotiate with this potential
18 purchaser?

19 A Yeah, that began in mid June of 1995.

20 Q With whom from Santa Cruz did you begin and continue
21 these negotiations?

22 A The daily discussions and the regular discussions were
23 with Jeff Seabrook and Jim Wilt.

24 Q Over what period of time did these negotiations occur?

25 A We started mid June of 1995 and finished early

1 September 1995, so it was throughout the summer.

2 Q Can you explain for me physically how you went about
3 doing these negotiations? Where were you?

4 A Most of the negotiations occurred in California. I
5 live in New Jersey, so I went out every week. I commuted
6 actually every week. There were several hotels we used from
7 Palo Alto, Los Gatos and Santa Cruz.

8 Q What was the general nature of the transaction that you
9 were discussing with Mr. Wilt and Mr. Seabrook?

10 A To sell the entire business to SCO so they could
11 continue with it fully.

12 Q Did you and the Santa Cruz negotiators have a nickname
13 for this proposed transaction?

14 A We did. Sleigh ride.

15 Q Why was that the nickname?

16 A The first hotel we met in June of 1995, outside -- it
17 was a Holiday Inn in Palo Alto, and outside there was a
18 Santa Claus and a sleigh. For some reason James decided to
19 call it sleigh ride.

20 Q How much of the UNIX business was to be sold in this
21 transaction, as you recall it, during your negotiations?

22 A Well, the entire business.

23 Q Was it the sale of just UnixWare?

24 A No. It was definitely UNIX and UnixWare.

25 Q What was the relationship between UNIX and UnixWare as

1 those terms sometimes get thrown around?

2 A UnixWare was the latest offer and it encompassed most
3 of the previous efforts, like UNIX. So really one can use
4 that term interchangeably.

5 Q As part of the deal you negotiated with Santa Cruz,
6 were the UNIX and UnixWare copyrights to be included or
7 excluded from the transfer?

8 A The deal with SCO was to include the copyrights.

9 Q Would holding back the copyrights have been consistent
10 with your instructions from Mr. Thompson?

11 A Absolutely not.

12 Q Did you ever instruct anyone on the deal to hold back
13 the copyrights?

14 A No.

15 Q Did you ever suggest to Santa Cruz that they were
16 buying the UNIX software business but not its copyrights?

17 A Absolutely not.

18 Q When do you first recall discussing the possibility of
19 the transaction with the Santa Cruz executives? I'm going
20 back a little bit now.

21 A Sometime in May of 1995.

22 Q Did there, after that point, arise an issue with
23 respect to the cash or money that Santa Cruz could pay for
24 the transaction?

25 A Yes. It was going to -- in one of the meetings in late

1 Q Was it your understanding, in your review of these
2 documents, that this referred to NetWare?

3 A Yes.

4 Q Did you have a chance to review this document before
5 the APA was signed?

6 A Yes.

7 Q Was it ever your understanding that this Roman numeral
8 V referred to the exclusion of UNIX or UnixWare copyrights?

9 A No.

10 MR. NORMAND: Section 1.6.

11 BY MR. NORMAND:

12 Q Mr. Chatlos, I'm going to direct your attention to
13 section 1.6 of the APA --

14 A Yes.

15 Q -- which is titled license back of assets. I won't
16 read this paragraph. Do you recall discussions of Novell's
17 intent regarding this prospect of a license back?

18 A Yes.

19 Q Can you briefly describe what the point of the license
20 back was?

21 A Since Novell was transferring the entire business to
22 SCO, there were groups within Novell that were using some of
23 the UNIX and UnixWare technology, both within labs and
24 within product that is distributed to customers. This
25 section covered Novell continuing to have the right to use

1 some of that UNIX code and include portions in their binary
2 products. So it's licensing from SCO to Novell the right to
3 use the source code and create some limited derivative
4 works.

5 Q Did you have a view, during the course of your
6 negotiations, as to why it would be necessary for Novell to
7 have a license back?

8 A Well, we were instructed to transfer the entire
9 business to SCO, so Novell would have no rights to it, so
10 this section covered giving back rights to Novell.

11 Q Mr. Chatlos, we're going to bring you back to schedule
12 1.1(b), the excluded assets schedule, and we're going to
13 look at the old language of the APA, the language that was
14 replaced referring to all copyrights. To your
15 understanding, if Novell had retained the UNIX and UnixWare
16 copyrights, would it have needed a license back?

17 A Absolutely not.

18 Q Why not?

19 A Retaining the copyrights is tantamount to having rights
20 to modify the source code.

21 Q Now you will recall, Mr. Chatlos, we had just looked at
22 section 1.6 of the APA which referred to a license back. We
23 now have on the screen Exhibit 162 titled Technology License
24 Agreement. Do you recognize this document?

25 A Yes.

1 Q Working other places, doing other deals, right?

2 A Yes.

3 Q Then the lawyers for the plaintiff come find you in
4 2004 and you have a conversation with them, and that's the
5 first time you focused on what the intent of the deal was
6 for the prior nine years; is that right?

7 A Probably, yes.

8 Q Nine years is a long time, isn't it, sir?

9 A Yes, it is.

10 MR. ACKER: If we could bring up one more time
11 today the schedule 1.1 of the asset purchase agreement,
12 please.

13 BY MR. ACKER:

14 Q Now you would agree with me, sir, that if we look at
15 paragraph V of 1.1(b), excluded assets, this is the
16 paragraph -- this is the paragraph in the asset purchase
17 agreement that tells us what was the intellectual property
18 that was excluded, that is did not transfer from Novell to
19 Santa Cruz under the asset purchase agreement, right?

20 MR. NORMAND: Object to the form for reasons we
21 discussed previously.

22 MR. ACKER: Let me deal with that.

23 BY MR. ACKER:

24 Q As far as you knew, in 1995, September of 1995, this
25 paragraph, paragraph V of 1.1(b), was the section that dealt

1 with what intellectual property was excluded from the
2 transfer, correct?

3 A Yes.

4 Q And as far as you knew when you left the company at the
5 end of the year, it was still this paragraph in this form is
6 what told both parties what intellectual property was
7 excluded from the deal, right?

8 A Yes.

9 Q And that paragraph reads, the intellectual property
10 paragraph of what was not transferred, in A, all copyrights
11 and trademarks, except for the trademarks UNIX and UnixWare,
12 correct?

13 A Yes, but I read this in the context of the entire
14 schedule, page 1 and page 2, and I had in my mind the intent
15 of what we were trying to accomplish.

16 Q I'm trying to focus -- and I'll get back to that in a
17 sec. I want to focus on the words here.

18 You would agree with me, wouldn't you, sir, this
19 doesn't say all NetWare copyrights, correct?

20 A That's correct. This whole language does not say that,
21 correct.

22 Q What it says is all copyrights, correct?

23 A Correct.

24 Q Now do I understand your testimony to be because there
25 were other references to NetWare in schedule 1.1(b), you

1 MR. NORMAND: Very few, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. NORMAND:

4 Q Mr. Chatlos, do you recall being asked about meeting
5 with attorneys for SCO in 2004?

6 A Yes.

7 Q By that time had you met with attorneys for IBM?

8 A Yes.

9 Q And what did you tell them about this issue of
10 copyright transfer?

11 A The same thing I'm saying today, that we transferred
12 the entire business, and that included the copyrights.

13 Q Did they propose that you sign a declaration?

14 A They did want me to sign a declaration, correct.

15 Q What happened?

16 A Well, after our meeting they said they would write up a
17 declaration and send it to me for signature.

18 Q Did they do that?

19 A They did do that.

20 Q Did you sign it?

21 A No, I didn't.

22 Q Why not?

23 A It didn't reflect anything near my conversation.

24 Q Do you have a clear recollection of your intent on
25 behalf of Novell to transfer all of the UNIX and UnixWare

1 assets?

2 A Yes, I believe so.

3 Q And whether it's nine years ago or 15 years ago, would
4 you remember something as fundamental as Novell's intent to
5 keep the copyrights?

6 A That would have destroyed the value of the deal for
7 SCO. Of course I would have remembered that.

8 MR. NORMAND: No further questions, Your Honor.

9 THE COURT: Mr. Acker.

10 MR. ACKER: Nothing else, Your Honor. Thank you.

11 THE COURT: Mr. Normand, may this witness be
12 excused, again, meaning he need not worry about being
13 re-called?

14 MR. NORMAND: Yes, Your Honor.

15 THE COURT: Mr. Acker?

16 MR. ACKER: Yes, Your Honor. Thank you.

17 THE COURT: Mr. Chatlos, thank you. That means
18 you do not need to worry about being re-called in this case.
19 You may go about your business. I will advise you to please
20 not discuss your testimony with any other witness in this
21 case or in the presence of any other witness or communicate
22 your testimony to any individual who may report that, okay?

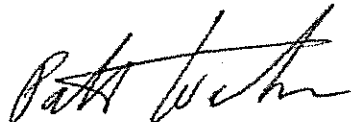
23 THE WITNESS: Okay.

24 THE COURT: Thank you.

25 Do you have a witness you can get done in ten

C E R T I F I C A T E

I hereby certify that the foregoing matter is
transcribed from the stenographic notes taken by me and is a
true and accurate transcription of the same.



PATTI WALKER, CSR-RPR-CP
Official Court Reporter
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Salt Lake City, Utah 84101
801-364-5440

DATED: 3-10-2010

EXHIBIT No. 18

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware)
corporation,)
Plaintiff,)
vs.) Case No. 2:04-CV-139TS
NOVELL, INC., a Delaware)
corporation,)
Defendant.)

AND RELATED COUNTERCLAIMS.)

BEFORE THE HONORABLE TED STEWART

March 11, 2010

Jury Trial

REPORTED BY: Patti Walker, CSR, RPR, CP

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1 designations and cross designations from the deposition of
2 Jack Messman. Do you want us at this time to proceed with
3 the next deposition?

4 THE COURT: I think we probably ought to get
5 started into it, if you would, please.

6 MR. NORMAND: Your Honor, the next witness whose
7 designations we'll play is Jim Wilt, who is in Santa Cruz.

8 THE COURT: Mr. Normand, will the deposition be
9 identified when this was taken? If not, would you please do
10 so.

11 MR. NORMAND: Yes, Your Honor. It was taken on
12 January 26th, 2007.

13 THE COURT: Thank you.

14 (James Wilt Deposition)

15 Q Do you recall the title you had at the time of the
16 asset purchase agreement?

17 A I believe my title was vice president of business
18 development. I had taken a very generic title.

19 Q And how about after that, did your title change when
20 you went into product engineering?

21 A Yes. I was senior vice president of products.

22 Q And did you have another position after senior vice
23 president of products?

24 A Yes.

25 Q What was that?

1 Q Is there any part of the declaration that you feel is
2 inaccurate or that you would like to correct?

3 A No.

4 Q If I could direct your attention to some language in
5 that declaration. I'm looking at paragraph 7 at the end
6 where you say, in referring to the negotiations from August
7 to September 1995 between Santa Cruz and Novell, that you,
8 quote, understood Mr. Chatlos to be Novell's chief
9 negotiator during those negotiations. Is that a correct
10 statement?

11 A This is a correct statement.

12 Q You say in paragraph 8, quote, it was my understanding
13 and intent during those negotiations that SCO would acquire
14 Novell's entire UNIX and UnixWare business, including the
15 copyrights. I do not recall and do not believe that there
16 ever was any instance in which anyone at SCO or Novell ever
17 stated or exhibited any contrary intent or understanding to
18 me or anyone else.

19 Is that an accurate statement?

20 A That's an accurate statement.

21 Q You say in the back half of paragraph 9, quote, it was
22 my intent on behalf of SCO to acquire, through the APA,
23 Novell's entire UNIX and UnixWare business, including the
24 UNIX and UnixWare source code and all associated copyrights,
25 and I believed then, open parens, as now, close parens, that

1 Novell's intent was to tell sell all of those assets and
2 rights.

3 Is that an accurate statement?

4 A Yes, that's an accurate statement. You wouldn't have
5 had a business without having the copyrights and trademarks.

6 Q You say in paragraph 12, quote, I do not recall anyone
7 on either side of the negotiations or transaction ever
8 suggesting that Novell would retain a copyright relating to
9 UNIX or UnixWare. I am not aware of any discussions,
10 whether general or specific, during the negotiations that
11 contradict my understanding of the transaction as set forth
12 in this declaration.

13 Is that an accurate statement?

14 A That is an accurate statement.

15 Q You say in paragraph 16, quote, pursuant to the APA,
16 the parties also signed a technology licensing agreement in
17 early December 1995 in which Novell licensed source code
18 rights from SCO. In my view, this licensing agreement was
19 consistent with SCO's ownership of the UNIX and UnixWare
20 copyrights following the closing of the APA, end quote.

21 Is that an accurate statement?

22 A That's an accurate statement because if you look at the
23 technology licensing agreement, it includes our giving
24 Novell the right to reproduce and license, under certain
25 conditions, that code, which if we didn't own the copyrights

1 and such, we wouldn't have had to give to Novell and
2 wouldn't have been able to give to Novell.

3 Q I direct you back to paragraph 10 of your declaration.
4 It states, quote, paragraph 4.16 of the APA pertains to the
5 binary royalty income stream that Novell retained through
6 the APA. The parties agreed to the language in paragraph
7 4.16(b) in order to allow Novell to manage that royalty
8 stream within the operation of SCO's customer source code
9 licenses -- not at the expense of SCO's right to enforce its
10 intellectual property protections under any such licenses,
11 and not to permit Novell to waive any of those protections.
12 I have reviewed Amendment No. 2 to the APA and believe that
13 the language therein confirms that intent. In light of my
14 intent, and based on my understanding of the parties'
15 intent, I do not believe that Novell had or has any right to
16 waive, or to direct or require SCO to waive any of its
17 intellectual property rights or protections.

18 Is that an accurate statement?

19 A That's an accurate statement.

20 Q Let me direct your attention, Mr. Wilt, to what was
21 marked earlier as Exhibit 27, which was described as your
22 second declaration.

23 A Okay.

24 Q Have you had occasion recently to review Exhibit 27?

25 A Yes, I reviewed this yesterday again.

1 Q Is there any aspect of Exhibit 27 that you believe is
2 incorrect or that you would like to correct?

3 A No.

4 Q Let me ask you about some specific paragraphs in this
5 declaration. You say in paragraph 4, quote, Santa Cruz's
6 intent and agreement under the APA and Amendment No. 1 was
7 for Novell to transfer the entire UNIX business, including
8 the UNIX source code and copyrights to Santa Cruz except for
9 binary royalties paid under the existing agreements pursuant
10 to which UNIX System V, open paren, quote, SVRX, end quote,
11 close parens, licensees were paying such royalties, and
12 which Novell conveyed to Santa Cruz under the APA as part of
13 the UNIX business.

14 Is that an accurate statement?

15 A That's an accurate statement, and it was the existing
16 licenses at the time of the transfer to SVRX that Novell
17 retained, you know, the equity interest, the financial
18 interest in.

19 MR. NORMAND: Your Honor, that completes SCO's
20 designations of Mr. Wilt.

21 MR. JACOBS: Your Honor, we have no counter
22 designations.

23 THE COURT: We'll go ahead and take a recess now.

24 Ms. Malley.

25 (Jury excused)

1 call by video deposition is Alok Mohan, who was deposed on
2 February 23rd, 2007.

3 (Alok Mohan called as a witness via videotape deposition)

4 Q In 1995 were you the President of the Santa Cruz
5 Operation?

6 A I was CEO around that time, '95 to '98.

7 Q Were you President and CEO Of the Santa Cruz Operation in
8 1995?

9 A I was Chief Operating Officer for a short while, and then
10 I became CEO.

11 Q Do you remember what your position was at the time of the
12 transaction between Novell and Santa Cruz Operation?

13 A I was the CEO.

14 Q Were you also a member of the Board of Directors?

15 A Yes.

16 Q And would it be fair -- what would -- you were aware that
17 there was a contract relating to the transaction between
18 Novell and Santa Cruz; correct?

19 A Yes.

20 Q Would it be fair to say that your involvement in the
21 Novell/Santa Cruz deal was only at a high level?

22 A I was involved as a CEO, at the CEO Level.

23 Q Would it be fair to say that your involvement as the CEO
24 For Santa Cruz on the Novell/Santa Cruz transaction was only
25 at a high level?

1 A What do you mean by high level?

2 Q Do you recall having characterized your involvement in
3 the Novell/Santa Cruz transaction as at the high level?

4 A Well, I was the CEO and there were a lot of people
5 involved within the transaction from our side, so I was
6 involved as a CEO.

7 Q So is it fair to say that your involvement in the
8 Novell/Santa Cruz deal was only at a high level?

9 A Yes.

10 Q Is it fair to say that you were not involved in the
11 details of the legal documents that were executed as part of
12 the Novell/Santa Cruz deal?

13 A I was involved in the normal processes. I was involved
14 in reviewing documents. I was not involved in writing them.
15 And the detail level of negotiations, I was not involved in
16 that, although I did have some discussions with Duff Thompson,
17 as well as Frankenberg.

18 Q You said, "I was involved in reviewing documents." As
19 you sit here today, what documents do you recall reviewing as
20 part of the Novell/Santa Cruz transaction?

21 A I recall looking at the APA and reviewing that.

22 Q Is it fair to say that you were -- you did not
23 participate in the negotiation meetings between
24 representatives of Novell and Santa Cruz when the legal
25 document was being drafted?

1 A I was --

2 MR. NORMAND: Objection to form.

3 THE WITNESS: -- involved in the negotiations with
4 Duff Thompson, and -- at a -- and, again, at a strategy and
5 CEO level. The specific drafting of the documents were done
6 by people, and I was not involved in that.

7 Q Now, you signed the Asset Purchase Agreement; is that
8 right?

9 A That's true.

10 Q Did you review the document before signing it?

11 A Yes, I did.

12 Q Did you go through it in a -- on a detailed basis by
13 yourself?

14 A I read it.

15 Q Did you read the Asset Purchase Agreement from the front
16 cover to the end?

17 A Yes.

18 Q And I take it that when you signed the Asset Purchase
19 Agreement on September 19th, 1995, you had no reason to
20 believe it was inaccurate?

21 A Yes, I agree with that.

22 Q And you had no reason to believe that the Asset Purchase
23 Agreement was not clear?

24 A It -- it -- these complex documents, it -- it represented
25 as best as we could tell at that time what the intent was.

1 And I looked at it, as I do all documents, with that in mind,
2 and it looked right to me so I signed it, yes.

3 Q When you read the document before you signed it, nothing
4 jumped out at you as being unclear; is that a fair
5 statement?

6 A Yes.

7 Q And when you signed the document on September 19, 1995,
8 you had no reason to believe that that contract did not
9 accurately reflect the parties' intent; correct?

10 A That's right.

11 Q One of the other items that Santa Cruz got through its
12 transaction with Novell in 1995 was the right to sell
13 UnixWare; correct?

14 A We bought the business.

15 Q Santa Cruz got the right to sell UnixWare; right?

16 A And, again, I -- I -- I will just keep it in terms of we
17 bought the business. We could do whatever we wanted to do it.
18 As part of that could we sell UnixWare? Absolutely. But as
19 part of the whole -- it's the whole business we bought.

20 Q And in 2000 do you recall that Santa Cruz agreed to sell,
21 among other things, the SCO OpenServer product to Caldera?

22 A This is where I was not -- I was on the Board. I was not
23 the CEO at that time. I was further removed from the
24 business, but -- so keep that in mind as you ask these
25 questions. Yes, we entered in an agreement to sell the Unix

1 business to Caldera.

2 Q And when you say that Santa Cruz agreed to sell the Unix
3 business to Caldera, I take it you're referring to not only
4 the SCO OpenServer product but also the Unix business that it
5 had purchased from Novell?

6 A Yes, everything.

7 Q In your personal view, what rights, if any, did Novell
8 retain after the Asset Purchase Agreement with Santa Cruz?

9 A I -- my belief has always been, and I believe we bought
10 the whole business. And I -- the intent of that -- intent of
11 that agreement, when I was talking to Duff Thompson and at
12 least in the higher level discussions, was we were buying the
13 whole business. It wasn't leaving any rights behind.

14 It was -- what happened was that since we couldn't afford
15 the purchase price of the SVRX revenue stream, which is like
16 checks coming in every month, basically what it was, and we
17 couldn't afford it. We couldn't pay the present value of what
18 that stream would be. We also felt that there was a
19 difference of opinion about what that stream is. And so as I
20 looked at it, it was a financial engineering -- it was a
21 transaction bridge between what we were willing to pay and
22 what they were willing to pay. What they wanted was to allow
23 them to keep that revenue stream.

24 Now, to keep a revenue stream, they needed the ability
25 to -- I assume -- the ability to make sure that we kept the

1 clients. If they had a problem with the SVRX, that we will
2 take care of -- or that problem is taken care of. But I was
3 not -- at least at our level, I was not thinking of that we're
4 leaving any rights like they owned anything or any rights of
5 that kind, no.

6 Q And So I -- I want to be clear. What particular rights
7 then do you think Novell retained? You said -- you said --
8 let me look at it this way. You said -- you said you thought
9 that Santa Cruz was leaving no rights behind.

10 A Yeah, pretty much.

11 Q So is it a fair statement then that you believe that
12 Novell was retaining no rights?

13 A My -- without -- without getting into the specific
14 documents, which every -- there were a lot of other people in
15 the organization who could do that for you. From a -- the
16 view of what we're buying, we're buying the whole business,
17 and we -- we had all the rights as we bought the business.

18 There was a revenue stream that -- and -- and I have to
19 assume that there is some ways to protect that revenue stream,
20 but I can't tell you what that would be, but it was not like
21 we were leaving something behind. We were buying the
22 business.

23 Q I want to fairly characterize what you're saying, so
24 correct me if I'm wrong. Is it a fair characterization of
25 your testimony that you believe that Novell was retaining no

1 rights through this transaction, but that it was retaining a
2 revenue stream related to SVRX?

3 A Yeah. I was -- I'm trying to state this is what my --

4 Q And I'm only talking about your personal belief, no one
5 else's.

6 A It's not so much a belief, because I know that there's
7 documents that have a certain defined definition of what they
8 can and cannot do. My negotiation, my involvement, was that
9 it was -- we bought the business. And there were some aspects
10 of things, and I can't tell you what they were, to allow them
11 to protect the fact that the revenue stream -- that they get
12 paid. And -- but I can't tell you anymore than that.

13 Q You keep referring to documents that you could look at.
14 Are you referring to the contract?

15 A Yeah, I assume.

16 Q Okay. So if I wanted to know what rights Novell
17 retained, can I look at the contract and find out?

18 A You'll have to look at it.

19 Q Is it true that if I wanted to find out what rights
20 Novell did retain, I could look at the contract?

21 A I don't know that.

22 Q You believe that Santa Cruz got the Unix copyrights
23 through the APA; is that right?

24 A We believe I bought the whole business. That includes
25 all kinds of stuff. And -- and, you know, I gave you the

1 answer. I think we bought -- we got the whole thing.

2 Q Okay. But you haven't -- you haven't confirmed. Is --
3 is -- are the Unix copyrights part of the Unix business?

4 A Absolutely.

5 Q What is the basis of your opinion that Santa Cruz got the
6 business?

7 A That -- that's -- that was the whole discussion and
8 intent, negotiations. That's my recollection of what we were
9 doing.

10 Q Now, back to the topic of Unix copyrights. Are you aware
11 that the subject of Unix copyrights was specifically addressed
12 in the contract?

13 A No, I'm not aware of that.

14 Q When you signed this document, you -- did you actually
15 look to see whether or not there were any provisions in here
16 relating to Unix copyrights?

17 A I -- I think -- I think we have to -- what I'm trying to
18 get across is it is not one item at a time. It is the
19 entirety of the document as I read it. I felt then that this
20 was buying the business. And I -- I -- it's not about
21 specific provisions. It was the entirety of the document.
22 And to me the business includes copyrights.

23 Q I'll just repeat the question. Is it your testimony that
24 you can't just look at the excluded assets provision to
25 determine whether or not Unix copyrights were included in the

1 transaction?

2 A Again, you got to look at the whole thing as an entirety.
3 And there were some issues relating to -- and that's why there
4 were amendments to these documents. And -- but my -- my point
5 that the intent was that we're buying the whole Unix business,
6 that included copyrights, etcetera, still that's what I
7 believe.

8 Q Do you recall who else at Novell you were dealing with
9 beside Mr. Frankenberg?

10 A The other person that I dealt with on the APA or the
11 discussion leading up to that was Duff Thompson.

12 Q Duff Thompson was the person that you were speaking to
13 before the Asset Purchase Agreement was executed?

14 A Right.

15 Q When you signed the declaration, were you content that
16 the language of the declaration reflected your views?

17 A Yes, I think so.

18 Q Looking at paragraph four of your declaration, Mr. Mohan,
19 you say in the third Sentence of that paragraph four quote:
20 "To the extent anyone is claiming that Novell retained the
21 Unix copyrights or that Novell retained the right to waive
22 material breaches of Unix system V agreements years after the
23 sale to Santa Cruz, such claims are contrary to my
24 understanding, intent and agreement. I would not have agreed
25 to do -- to those terms if anyone had suggested that that was

1 what Novell was offering," end quote. Do you see that
2 language?

3 A Yes.

4 Q Why would you not have agreed to those terms if someone
5 had suggested that that was what Novell had offered?

6 A Well, I -- I was -- I can speak to the strategy and the
7 intent was we wanted to buy the business. I made this point
8 earlier today. And the business included all the assets,
9 which included in my view copyrights. And what -- and we're
10 kind of buying the stuff lock, stock and barrel. It would
11 have been that way if you could have afforded the present
12 value of the royalty stream, but because of cash constraints
13 we had to -- cash constraints and the differences -- potential
14 differences on what the value of that future stream would be,
15 that we said we'd pass the revenue on to Novell, 95 percent of
16 it on to -- to Novell.

17 But as I saw it, we bought the business that included all
18 this stuff. And if you -- if you don't buy -- an evaluation
19 in my mind was set based on we bought the whole business.

20 Q Why would you not have agreed to the terms of the deal if
21 someone had told you that the Unix copyrights were being
22 retained by Novell?

23 A I felt -- I believe that is all part of the value of what
24 we were buying, and it's -- it's an assessment of the value of
25 what you buy, what you pay for. And to me that was -- that

1 was part of what we had bought, and it would be a lot less
2 value without it in my view.

3 Q Why would you not have agreed to the terms of the
4 transaction if anyone had suggested to you that Novell
5 retained the right to waive material breaches of Unix System V
6 agreements?

7 A If they could waive material breaches, then we did not
8 control Unix System V as an asset. It was of less value to
9 us.

10 Q You say in paragraph five quote, "As the Chairman of the
11 Board of Santa Cruz in 2001, I understood that Santa Cruz
12 conveyed to Caldera International, Inc. all of the Unix and
13 UnixWare assets that Santa Cruz owned, including all of the
14 Unix intellectual property rights, such as the copyrights that
15 Santa Cruz had obtained from Novell," end quote. Do you see
16 that language?

17 A Yes.

18 Q Is that an accurate statement?

19 A I think so.

20 MR. NORMAND: Your Honor, at this point we would ask
21 to publish to the jury SCO exhibit 526, which is already in,
22 And to highlight the portions of that exhibit that Mr. Mohan
23 will be subsequently asked about.

24 THE COURT: Go ahead.

25 MR. NORMAND: This is the press release from

1 September 20th, 1995 after the execution of the APA. The
2 first paragraph of the press release states quote, "The Santa
3 Cruz Operation, Inc. and Novell Inc. today announced a
4 definitive agreement for SCO to purchase the Unix business
5 from Novell."

6 Next paragraph down: "Alok Mohan, President and CEO Of
7 SCO, said, 'This extends SCO's leadership position in the
8 Business Critical Server market. Our customers and resellers
9 not only get a powerful Unix operating system, but also the
10 most advanced network services in the world. Novell's
11 advanced network services, such as NetWare Directory Services,
12 are setting the standard for business networking. Our
13 customers will be able to integrate their Business Critical
14 Servers with their existing work groups to provide their
15 people with greater access to corporate data."

16 And on page two of this press release there's a --
17 Mr. Calvin, let's start with the top paragraph -- those
18 two.

19 The first paragraph is a quote from Robert J.
20 Frankenberg, Chairman and CEO of Novell. And then the next
21 paragraph states: "According to the terms of the agreement,
22 SCO will acquire Novell's UnixWare business and Unix
23 intellectual property."

24 And I'd like to continue with the deposition, Your Honor.

25 Q -- Mr. Mohan, what's previously marked as Exhibit 1028.

1 Exhibit 1028 is titled "Press Release" under SCO letterhead.
2 The title of the press release is, quote: "SCO acquires Unix
3 business from Novell and licenses NetWare technology," end
4 quote.

5 Do you see that you're quoted in the second paragraph of
6 the first page?

7 A Yes.

8 Q And do you see that Robert Frankenberg, Chairman and CEO
9 Of Novell, is quoted at the top of the second page?

10 A Yes.

11 Q The press release states on page two, in the first
12 Sentence of the second paragraph quote: "According to the
13 terms of the agreement, SCO will acquire Novell's UnixWare
14 business and Unix intellectual property," end quote. Do you
15 see that language?

16 A Yes.

17 Q Does that language accurately reflect your understanding
18 of the transaction?

19 A This language is consistent with what I've been saying
20 today about we bought the business. We bought the UnixWare
21 and Unix intellectual property. We bought the business. And
22 that's what I thought we were buying, and I still believe
23 that's what we bought.

24 Q Did anyone from Novell ever say to you prior to the
25 execution of the APA that Novell intended to retain any Unix

1 THE COURT: That will be fine. Before you do
2 though, if you'll hold on.

3 Ladies and gentlemen, I have to ask you this. During the
4 sidebars, do any of you hear anything that is being said, even
5 close?

6 A JUROR: No.

7 THE COURT: You can see our lips move?

8 A JUROR: Just a lot of fuzz.

9 THE COURT: All right, thank you.

10 Go ahead.

11 Q So we're handing you exhibit 76, which is a December
12 22nd, 2003 declaration of Steve Sabbath. Do you see that?

13 A Yep.

14 Q I'd ask you to turn to page 6, paragraph 11.

15 A Uh-huh.

16 Q It reads, quote: "Under the Asset Purchase Agreement,
17 Novell retains significant Unix related assets following the
18 sale. For example, schedule 1.1(b) of the Asset Purchase
19 Agreement provided that much of the Unix System V intellectual
20 property would not be transferred to Santa Cruz by listing the
21 following items as excluded assets." And then it goes on to
22 quote Roman V on intellectual property from excluded assets.
23 "A: all copyrights and trademarks, except for the trademarks
24 Unix and UnixWare." Do you see that?

25 A Uh-huh, I see it.

1 Q Do you agree with Mr. Sabbath's statement in paragraph 11
2 that we just read?

3 A No. As I've stated so many times to you, I believe that
4 we were buying the Unix business, and we were buying the
5 complete business, except for the economic financial binary
6 revenue stream. That was my intent. That was what my belief
7 is, and it still is belief, irrespective of number 11 on page
8 six on this old document, which is not something I'd seen
9 before.

10 Q Mr. Mohan, I'm -- I've handed you exhibit 80 --

11 A Yes.

12 Q -- which is the proxy statement -- I'll represent to you
13 is the proxy statement that was sent to Santa Cruz
14 shareholders.

15 A Okay.

16 Q Can you just look --

17 MR. JACOBS: Your Honor, at this point we would like
18 to move into evidence Novell's Exhibit J10, which is a
19 Santa Cruz proxy statement sent to shareholders. We will trim
20 this exhibit so that only the relevant pages are provided to
21 the jury. We'll be looking at pages 132 and 133.

22 THE COURT: Any objection?

23 MR. NORMAND: No objection, Your Honor.

24 THE COURT: It will be admitted.

25 (Defendant's Exhibit J10 received in evidence)

1 Mr. JACOBS: That completes the testimony of this
2 witness, Your Honor.

3 THE COURT: Thank you, Mr. Jacobs.

4 Mr. Normand, if you would, please, your next one.

5 MR. NORMAND: Your Honor, we next call -- we propose
6 to present the designations of Doug Michels, who was at Santa
7 Cruz.

8 THE COURT: The deposition was taken when?

9 MR. NORMAND: March 28th, 2007.

10 THE COURT: Thank you.

11 (Douglas Michels called as a witness via video deposition)

12 Q -- September of '95 at SCO?

13 A Dates aren't my favorite thing, but as best as I can
14 determine, I was probably CTO At that point, Executive
15 Vice-President and CTO.

16 Q Are there other possibilities or are you --

17 A I was there for 20 years and I had half-a-dozen titles,
18 and it never really changed my job much, so I never worried
19 about what the title was.

20 Q Well, how would you characterize your participation in
21 the Asset Purchase Agreement negotiations?

22 A Well, I was very involved in the initiation of it, and I
23 was very involved in the strategy behind it, and I was very
24 involved in the high level structure of the agreement, and I
25 was involved in supervising pretty directly the people who

1 were negotiating the details of the agreement.

2 Q When you say you were involved in the initiation of the
3 agreement, can you tell me what you mean by that?

4 A Well, unfortunately this is a very long time ago, and I'm
5 really bad at dates and, you know, trying to -- trying to get,
6 you know, remote facts in exactly the right order. But, you
7 know, the discussion of essentially acquiring Unix had been
8 going on for ten years. And before Novell even bought Unix we
9 were involved in discussing it with A.T. & T.

10 And so I believe this particular round that went to the
11 Asset Purchase Agreement was kicked off by Mike DeFazio
12 contacting me at a Uniform conference and opening up the
13 discussion. I mean I know he contacted me and I know he
14 opened up the discussion, and I'm pretty sure that it was that
15 conversation that went to the Asset Purchase Agreement, but it
16 could have been -- it could have been a different iteration.
17 I'm not a hundred percent sure. This was as a -- as I say, a
18 ten year process.

19 Q Understandable. Can you put even a rough time frame on
20 Mr. DeFazio's initial conversation with you?

21 A Well, we'd have to go identify when Uniform in Dallas
22 was, but I suspect it was, you know, within a few months of
23 the negotiations getting serious.

24 Q You also said that you were involved in the strategy of
25 the Asset Purchase Agreement. Can you tell me more about what

1 you meant by that?

2 A Sure. It's a big -- a major decision for the company
3 to -- to, you know, make that bet. So the whole issue of did
4 we want to own it? Did -- what did we want to do with it?
5 How do we figure out how to pay for it? I mean That was
6 all -- that was all, you know, discussions that were strategic
7 in nature and that I was involved with.

8 Q And you also mentioned that you supervised the people who
9 negotiated the deal. Who were those people?

10 A Primarily Jim and Geoff and some of the legal people, but
11 the real business development team was Jim Wilt and Geoff
12 Seabrook. And, again, I don't recall whether -- whether they
13 were directly reporting to me at that point or not, or one of
14 them was and one of them wasn't.

15 I mean, again, over the years they often reported to me,
16 and I worked very closely with -- whether they were reporting
17 to me or someone else, we worked very closely as the team and
18 business development was one of the -- one of my main roles.
19 I met with them regularly, and whatever issues came up that
20 they had trouble resolving, they would -- they would come to
21 me, so --

22 Q Apart from your initial meetings with Mr. DeFazio, did
23 you have other meetings face-to-face with Novell personnel as
24 part of the APA negotiations?

25 A Yes.

1 Q With whom?

2 A I don't remember.

3 Q How -- how many meetings would you say?

4 A Two or three.

5 Q Okay. Do you recall the time period of those? Was it

6 close to the execution? Earlier?

7 A Both.

8 Q Do you recall anyone who was at -- present at those

9 meetings, either from your side or from Novell?

10 A Well, certainly Jim Wilt and Geoff Seabrook and I think

11 Ed Chatlos, some of the legal -- some of the legal people.

12 Q Do you recall any of the legal people?

13 A Kim Madsen on our side. I don't remember the names of

14 the Novell legal people.

15 Q Do you have an understanding as to what the purpose of

16 the Asset Purchase Agreement was?

17 A Sure.

18 Q What is your understanding of the purpose of the Asset

19 Purchase Agreement?

20 A We were buying the original A.T. & T./Unix business from

21 Novell, who had bought it from A.T. & T.

22 Q And what's the basis for that statement? What leads you

23 to say that?

24 A That was the deal.

25 Q Um --

1 A That's what Mike and I talked about in Dallas and that's
2 what the deal was, was Novell didn't want it anymore, we'd
3 always wanted it. He said, "Do you want to buy it?" I said,
4 "Yeah." We bought it.

5 Q I want to talk a bit about some of the subsidiary related
6 agreements that came along with the Asset Purchase Agreement.
7 Did you have any involvement in the negotiation of the
8 technology licensing agreement?

9 A Yeah. I tried to stay completely away from the actual
10 mechanics of the agreement and stick to who was getting what.
11 And what was in which piece of paper, I mean, I completely --
12 you know, had a great business development team. We had a
13 good legal team. You know, as long as they found the right
14 way to engineer the documentation to match what -- what we had
15 agreed at a business level needed to happen, you know, as to
16 which agreement did what, you know, that wasn't my job.

17 Q I take it then the answer is no, that you didn't have
18 involvement in the actual negotiation of the technology
19 licensing agreement?

20 A I don't know if I did or not. I had involvement in
21 what -- what we got or what they had or who did what, which
22 document it went into, I don't know.

23 Q Do you recall seeing drafts of the technology licensing
24 agreement?

25 A I saw stacks of paper on people's desks.

1 to waive any of its intellectual property rights or
2 protections contained in the Unix licenses." What's the basis
3 for that statement?

4 A We bought the whole business.

5 Q Except for certain revenue streams though; isn't that
6 right?

7 A We bought the whole business. We partially paid for it
8 with the residual revenues from certain contracts.

9 Q As to those contracts, did Novell retain any rights?

10 A It was purely a financial arrangement. We bought the
11 whole business. The only rights they retained was rights
12 preventing us from arbitrarily destroying that revenue
13 stream.

14 Q What rights were those?

15 A Well, I mean if -- if we were to go to the customer and
16 say, "Okay, you don't have to pay anymore," then they would
17 have to approve that because that would be damaging their
18 revenue stream.

19 Q And I -- so I understand your testimony, and what I'm
20 trying to do here is drill down a bit. You've testified about
21 the intent of the deal, and you're testifying specifically
22 about the intent as applied to Novell's rights, and I want to
23 know why you believe this is the intent. Is this something
24 that was told to you? Is this something -- you know --

25 A This was the agreement that I reached with Novell, that

1 the group meetings -- I mean it was clear from day one in our
2 strategy we were buying the business. We needed to control
3 the customers. We didn't need to be -- have Novell also
4 talking to our customers.

5 The reason that -- even on the residual revenue stream
6 that they essentially got all the money, we said we're going
7 to collect the money for you because we don't even want you
8 talking to our customers at all. That was the discussion.
9 The reason we demanded the five percent was we needed that
10 just to cover our costs to collect the money because we were
11 collecting it on behalf of Novell because they were not to
12 ever talk to our customers. Otherwise we would have just let
13 them collect the money.

14 I mean that was clearly discussed by all parties, that we
15 were to be the complete relationship management of that -- of
16 all customers, and we should be the only ones ever talking to
17 them.

18 Q And what I'm talking about is something a little more
19 specific than that than relationship manager. Novell retained
20 certain revenue streams, we've agreed. And Novell has argued
21 in this case that it retained certain rights with respect to
22 those contracts. One of those rights is the ability to
23 command SCO to do certain things as concerns those contracts.
24 I take it that's inconsistent with your memory of the
25 negotiations; is that right?

1 A That's correct.

2 Q And tell me more about why it's inconsistent with your
3 memory of the negotiations. Can you come up with anything
4 specifically?

5 A Yes. Our -- our agreement with Novell was that we were
6 buying the entire business. We would have all relationship
7 management and account control with those customers. How can
8 you have all account control if somebody else can order you to
9 do something with them? Doesn't make any sense. It's
10 inconceivable. We would never agree to that.

11 Q Did they say at any point during -- did Novell convey
12 that it didn't have the authority to direct SCO to make
13 changes to SVRX licenses at any point to you?

14 A As I said, I'm talking about their actions, not what they
15 said. Their actions were that they made direct contact with a
16 customer and directly modified the license agreement with a
17 customer, and we said that's a breach of contract, and they
18 negotiated a settlement.

19 Q I take it then the answer to my question is no, you never
20 heard Novell say something like that?

21 A I'm not saying that.

22 Q Okay. I'll ask you the question again. Did you ever
23 hear Novell tell --

24 A You know --

25 Q -- you that -- that they did not have the authority to

1 things that lawyers don't write. They're simple. They're
2 easy to read. They're clear. They're in English. I reviewed
3 term sheets.

4 Q So I take it then the answer is no, you do not recall
5 reviewing any drafts of the actual language of the amendments
6 or agreements that took place as part of this?

7 A Only to the extent that it was the same as the language
8 in the term sheet, which it may or may not have been.

9 Q Do you recall there being term sheets as part of this
10 effort to resolve this dispute?

11 A There was some form of term sheet. What form it was in,
12 whether it was e-mails or whether there was an actual, you
13 know, Word document, I don't know. But there was definitely a
14 short English summary of what the terms of the settlement
15 would be.

16 Q And I take it you were involved in the term sheet portion
17 of this --

18 A Yes --

19 Q -- Negotiation?

20 A Absolutely.

21 Q Who else was involved in that?

22 A Alok, and I'm sure Geoff, Steve Sabbath, Kim. I don't
23 know who else.

24 Q You testified this morning that one of the purposes of
25 the APA was to buy the original Unix business. Do you recall

1 that?

2 A Yes.

3 Q Was one of the purposes of the APA to buy the UnixWare
4 business as well?

5 A Yeah. What I meant was the intent was to buy the
6 business that had originally started at A.T. & T. and Bell
7 Labs, and then became U.S.L., and then was acquired by Novell,
8 and then -- and that -- that whole business is also what
9 created UnixWare. But I mean we bought the employees and the
10 body of that business, which included everything they ever
11 did, which obviously included UnixWare, as well as SVR IV and
12 SVR III and SVR V.

13 Q Do you recall -- independent of how it was embodied in a
14 particular agreement, do you recall the issue of a license
15 back to Novell in --

16 A Yes.. We wanted to make sure that that license didn't
17 give them any rights to go back into the Unix business or to
18 use that technology other than had incidentally perhaps crept
19 in. And so we -- we did effectively grant them rights to Unix
20 technology as necessary to protect them from any incidental
21 use of Unix inside of their existing products.

22 Q And did you have an understanding at the time as to the
23 basis on which Santa Cruz granted Novell rights to the Unix
24 technology?

25 A The basis, what do you mean?'

1 Q Was it your view that Santa Cruz owned rights in the Unix
2 technology as of the date of the license back to Novell?

3 A Of course. We bought the business. And as a result of
4 buying the business, we owned all the intellectual property.

5 Q Was it ever your understanding when you were at Santa
6 Cruz that in order to acquire any Unix or UnixWare copyrights,
7 Santa Cruz was obligated to go back to Novell and make a case
8 as to why Santa Cruz needed the copyright?

9 A Of course not.

10 Q Did any attorney --

11 A We owned the business.

12 Q Did any attorney from Santa Cruz ever tell you any such
13 thing?

14 A No.

15 Q Did any executive or any employee of Santa Cruz ever tell
16 you such thing?

17 A Not that I can recall. If they did, I would have laughed
18 them out of my office.

19 Q Let me direct your attention to paragraph nine, which you
20 looked at earlier with Mr. Melaugh. You say in the last
21 sentence, quote, "There was no intent to grant Novell any
22 right to waive or to direct or require SCO to waive any of its
23 intellectual property rights or protections contained in the
24 Unix licenses," end quote. Do you see that language?

25 A Yes.

1 Q Does that language accurately reflect your intent?

2 A Yes, it does.

3 Q I have a few follow-ups. Let's begin where we left
4 off -- or he left off. And Mr. Normand just listed through a
5 series of bases for your testimony about the intent of the
6 deal. One of those bases was communications back from SCO
7 employees. What specific communications back from SCO
8 employees were you referring to?

9 A Again I had close, close interaction with particularly
10 Geoff Seabrook and Jim Wilt, as well as Kim and Steve and the
11 legal department and had, you know, virtually daily e-mails or
12 phone calls or conversations.

13 Q Okay.

14 A Continuous conversations I mean.

15 Q Can you recall any specific e-mail, telephone
16 conversation, in-person conversation that has informed the
17 testimony that you've given today?

18 A Oh, sure, ten years ago on Tuesday I think it was -- no,
19 of course not. I mean we talked daily.

20 Q I'm going to -- I'm going to ask the same thing about
21 each of the topics Mr. Normand went through, but maybe we can
22 shortcut it.

23 A That would be nice.

24 Q What is your opinion as to the scope of that phrase,
25 namely, copyrights required for SCO to exercise its rights,

1 and so on? What copyrights does that include?

2 A I mean I believe the scope of the term here is all
3 copyrights relating to the Unix business: Source code,
4 documentation, screens, you know, training materials, you
5 know, brochures, marketing literature. I mean, you know,
6 there's millions of copyright things in a business.

7 Q Why are all those copyrights required for SCO to exercise
8 its rights with respect to the acquisition?

9 A We took over the business. We were in the business of
10 selling intellectual property. We were in the business of
11 supporting the intellectual property. We were in the business
12 of providing training. We were in the business of providing
13 marketing materials. We couldn't do any of that without
14 owning the copyrights.

15 Q Just one question. You said in response to a question
16 from Mr. Melaugh that you assumed to the copyrights we're
17 going over. Do you recall using words to that effect?

18 A Okay, I might have.

19 Q To the extent that you did, what did you mean by that?

20 A I meant that the only way I know of and anyone on my team
21 knew of to buy a software business is to buy the copyrights.
22 And there's no way we would have ever done a deal to buy a
23 software business where we didn't get the copyrights and all
24 the other intellectual property. That's what you're buying.
25 And especially in the case of Unix with its convoluted

1 intellectual property history and whatnot, to not -- to not
2 get that stuff would be to not do the deal.

3 And so it was implicit in everything we did, everything
4 we thought. Every single person on my team understood that.
5 The lawyers understood it. The business development people
6 understood it. I mean it's just -- it's so essential it's,
7 you know, like breathing oxygen. I mean there's no way that
8 deal could have happened without getting the copyrights.

9 Q What's the basis for that testimony?

10 A And we had, you know, many meetings, many dinners. I
11 mean it was just implicit. It's in the -- it's in the water.
12 I mean you -- you don't buy software companies without buying
13 the intellectual property, and you don't buy the intellectual
14 property without buying the copyrights.

15 Q But no one from Novell ever said to you, "We're
16 transferring the Unix copyrights as part of this deal"?

17 A I have no idea what people said ten years ago.

18 Q You don't have a memory of someone saying that?

19 A Specific words? I have no memory of any specific words
20 at all from ten years ago.

21 Q Or words to that effect?

22 A You know, I'm not going to testify to words I don't
23 remember. I know that -- I know with certainty that everybody
24 involved understood the copyrights were part of the deal.

25 Q Did anyone from Novell -- I believe you were asked did

1 anyone from Novell ever tell you that Novell owned the Unix
2 copyrights. Did anyone from Novell ever tell you that SCO
3 owned the Unix copyrights between the time of the Asset
4 Purchase Agreement and 2001?

5 A You know, the reason I can say with certainty that nobody
6 from Novell ever said that they did is because that's so
7 preposterous a thing, I would remember it.

8 Q Well, Mr. Normand asked you I think a fairly specific
9 question, whether SCO held itself out to be the owner of the
10 Unix copyrights --

11 A Yes.

12 Q -- between 1995 and 2001?

13 A We thought ourselves to be the owner of everything. We
14 owned Unix. We owned the product. We spent a lot of money.
15 We gave away 20 percent of our company to buy Unix. Of course
16 we held ourselves out to be the owner of Unix.

17 Q I'm talking specifically about copyrights in this
18 instance.

19 A In my mind they're not separable. If you own UNIX, you
20 own the copyrights. It's a legal distinction that you're
21 making that doesn't parse to a -- to a normal human being. I
22 don't -- I don't know how to answer your questions. It's
23 jibberish.

24 Q Apart from the license deals, are you aware of any other
25 instance in which SCO held itself out specifically to be the

1 owner of the UNIX copyrights, as opposed to Unix generally?

2 A I don't -- I'd have to think about that. I don't know.

3 Q If you need a moment to think about it, I'm happy to --

4 A I can think about it for a couple hours I might not know.

5 I mean I don't think that way. We don't talk about

6 copyrights. But I'm sure there are places where we held

7 ourselves out to own the copyrights, because there's no

8 question in our minds that we did. You're asking me to recall

9 where specifically ten years ago we might have said something

10 obvious, and that's a very hard question.

11 Q If you don't have a memory of it, you don't have a memory

12 of it. I'm not asking you definitively whether it occurred or

13 not. I'm just asking you about your recollection.

14 A Well, you know, I guarantee you we put copyright notices

15 in every document we wrote. How could we do that if we didn't

16 own the copyrights? We put copyright notices in every module

17 of source code we wrote. They all said we owned the

18 copyrights. So there's two more examples. We signed

19 non-disclosure agreements with people. I'm sure they included

20 copyrights.

21 So I mean it's everywhere. Everything we did. There's

22 no -- there's no break in this pattern. We owned Unix. We

23 owned the copyrights. We owned the trademarks. We owned the

24 intellectual property, and every action we took represents

25 that.

1 Q. I take it it's your testimony that you haven't
2 had conversations, one way or the other with Novell, about
3 UNIX copyright ownership between 1995 and 2001?
4 A. I might have. I don't know. I don't recall.
5 Q. You don't recall any conversation, one way or the
6 other?
7 A. I certainly recall with certainty that Novell
8 never claimed that they had the copyright.
9 Q. Did SCO -- did anyone from Novell ever say that
10 SCO owned the UNIX copyrights?
11 A. I don't know.
12 MR. JACOBS: That concludes this witnesses testimony,
13 Your Honor.
14 THE COURT: Thank you, Mr. Jacobs.
15 Mr. Normand, your next deposition?
16 MR. NORMAND: The next deposition designation will be
17 of Burt Levine who was deposed on March 23rd, 2007.
18 (Whereupon, the following is deposition excerpts of
19 Mr. Burt Levine's deposition.)
20 Q. Okay. You were a lawyer for AT&T back in the
21 1980's; is that correct?
22 A. That's correct.
23 Q. How many lawyers were there in the legal
24 department at AT&T in the eighties? Roughly.
25 A. I guess between 75 and a hundred.

1 Q. Is this document, Schedule 1.1(b), unclear to
2 you?

3 A. Yes.

4 Q. How is it unclear to you?

5 A. The asset that purports to be transferred from
6 Novell to SCO in the intent of the parties ex -- will
7 include, to my reading or to my knowledge, even though I
8 don't remember the specific terms of this agreement, the
9 intention was to convey all of these ownership and auxiliary
10 ownership rights to the asset including copyright. And the
11 fact that there is this kind of an exclusion there tells me
12 that there is an ambiguity in this agreement or a mutual
13 mistake which wipes out any kind of an integration clause.
14 I don't agree that that's what the agreement means.

15 Q. Can you tell me in your view what is ambiguous
16 about the exclusion on Schedule 1.1(b) of, quote, all
17 copyrights and trademarks except for the trademarks UNIX and
18 UnixWare?

19 A. I don't think you can exclude a copyright in this
20 kind of an asset transfer. I think you can exclude a
21 copyright if you're transferring the physical manifestation
22 of the asset, but when you purport to transfer the whole
23 asset and all the business and everything else I think
24 inherent in that is going to be the copyright and it's a
25 contradiction in terms for the copyright to be excluded like

1 this.

2 Q. What language can you point me to where there is
3 that restriction in Section 4.16(b)?

4 A. I think you would have to look at the intent of
5 the parties. The intent of the parties was to give as one
6 category of compensation a royalty stream.

7 Q. Aside from the intent of the parties, can you
8 point me to any specific language in Section 4.1(b) that
9 supports your limitation on Novell's dictation right?

10 A. No, I can't point to anything specifically in
11 those sections but it's inconceivable to me that if you take
12 the language of (b) literally, this derogates 100 percent
13 from the grant that's being given from Novell to SCO. The
14 grant is illusory if Novell wanted to actually enforce
15 something like this to the extent it says in subsection (b).
16 There may as well not be an agreement.

17 Q. Now you've talked about the intent of the
18 parties, Mr. Levine, as being the basis for your view that
19 the dictation right in 4.16(b) is limited to a royalty
20 stream. What specifically can you point me to in support of
21 your view of the intent of the parties on 4.16(b). You can
22 answer?

23 A. I can't point you to anything in the agreement.

24 Q. What are you referring to when you talk about the
25 intent of the parties? What are you basing that on?

1 work I did on one versus the other.

2 Q. Do you remember any particular provisions in this

3 contract as you sit here today?

4 A. No.

5 Q. Memories can fade over time?

6 A. Yes.

7 Q. You would agree with me that a contract is

8 written to govern the rights and obligations of the party;

9 isn't that right?

10 A. I believe that's usually the purpose of it.

11 Q. Do you recall as you sit here today that there

12 were any provisions in this September 19, 1995 contract

13 relating to intellectual property as assets?

14 A. No, I don't recall.

15 Q. Let me turn your attention to Exhibit 1 which is

16 the September 1995 contract between Novell and Santa Cruz?

17 A. (Complies.)

18 Q. And ask you to turn to the page in the lower

19 right-hand corner ending in 950?

20 A. (Complies.)

21 Q. Are you there?

22 A. Yeah.

23 Q. Okay. And you'll see this is a part of the

24 contract entitled Schedule 1.1(a) entitled Assets?

25 A. Yes.

1 Q. Okay. And if you turn to -- you see there are a
2 series of Roman numerals on the left-hand side, do you see
3 that?

4 A. Yes.

5 Q. I'd ask you if you could turn to Roman numeral V
6 which is on the third page of Schedule 1.1(a)?

7 A. (Complies.)

8 Q. Do you see that?

9 A. I do.

10 Q. Okay. And do you see that Roman numeral V is
11 entitled Intellectual Property?

12 A. Yes.

13 Q. And do you see that it lists one particular type
14 of intellectual property as an asset?

15 A. Yes.

16 Q. And it's listed as "trademarks UNIX and UnixWare
17 as and to the extent held by Seller, parenthetical,
18 excluding any compensation Seller receives with respect to
19 the license granted to X/Open regarding the UNIX trademark"?

20 A. I see it, yeah.

21 Q. And that's the only type of intellectual property
22 listed as an asset; is that right?

23 A. Yes.

24 Q. Aside from listing trademarks UNIX and UnixWare,
25 it doesn't list any other type of intellectual property as

1 an asset, does it?

2 A. No.

3 Q. Do you recall that there was a schedule of

4 excluded assets in the September 19th, 1995 contract between

5 Novell and Santa Cruz?

6 A. I guess to the extent I remember anything about

7 this document, I would have remembered this, but -- as a

8 title of something in here, I think so, yeah.

9 Q. And I'll ask -- well, as an experienced lawyer in

10 transactions what does excluded assets mean to you?

11 A. Just off the top of my head what you're asking.

12 Q. Yes.

13 A. If you have a definition in the agreement of a

14 particular term, an asset means so and so and so and so and

15 so and so, usually you would put the exclusion right in that

16 same paragraph, which is my practice. I'm assuming, because

17 I don't know different, that this has got the same effect

18 that whatever an asset is, it does not include this.

19 Q. Do you see the last sentence, Mr. Levine, of this

20 Section 1.1(a) of the contract that says, quote,

21 Notwithstanding the foregoing the capital assets to be so

22 purchased shall not include those assets, parenthesis (the,

23 quote, excluded assets, quote) parenthesis, set forth on

24 Schedule 1.1(b)?

25 A. I see it.

1 Q. Now turning back to the Excluded Asset Schedule
2 in Schedule 1.1(b) that we were just looking at which is on
3 Page 954 of this document in front of you, as an experienced
4 lawyer do you understand that what's listed in this Excluded
5 Asset Schedule is specifically an asset or assets that are
6 not included in the purchase?

7 A. As a matter of form that's true, I agree with
8 you.

9 Q. Then referring you to Page 955 in the lower
10 right-hand corner which is the second page of the Excluded
11 Asset Schedule?

12 A. (Complies.)

13 Q. By the way, there are eight items that are listed
14 on the Excluded Asset Schedule; is that right?

15 A. Eight Roman numerals, yes.

16 Q. Right. And those are assets of substance; isn't
17 that right?

18 A. Intellectual property, yes, definitely.

19 Q. And if you look at Roman V it is entitled
20 Intellectual Property, correct?

21 A. Right.

22 Q. And it lists as two types of excluded
23 intellectual property, one, all copyrights and trademarks
24 except for the trademarks UNIX and UnixWare, and two, all
25 patents; do you see that?

1 A. I see that.

2 Q. Okay. What is listed is (a) and (b) of Roman V
3 are specifically excluded assets under this contract, would
4 you agree with me?

5 A. Specifically listed assets, yes.

6 Q. Specifically listed as excluded --

7 A. Right.

8 Q. -- assets, correct? In reading this, do you
9 understand that Novell is excluding all patents from this
10 asset transfer?

11 A. I understand what the agreement says, I
12 understand what the exclusions are in the document.

13 Q. Okay. And based on reading this exclusion in the
14 contract do you understand that all copyrights and
15 trademarks except for the trademarks UNIX and UnixWare are
16 excluded from this asset transfer?

17 A. No, I don't.

18 Q. You disagree with the language in this schedule;
19 is that right?

20 A. No, I don't disagree that these are listed here,
21 I disagree that in the context of this agreement that this
22 is, that this is the whole story.

23 Q. Based on what you're saying today, would you have
24 stricken this from the Excluded Asset Schedule?

25 A. You're asking me to say what I would have done,

1 certainly that would have been something that went through
2 my mind, I don't know what I would have done.

3 Q. Well, you seem to think there's an ambiguity as
4 you sit here today in this copyright --

5 A. Well, ambiguity or mistake, yeah.

6 Q. Okay. As you sit here today you think there's
7 some kind of ambiguity or mistake in this Excluded Assets
8 Schedule excluding all copyrights and trademarks except for
9 the trademarks UNIX and UnixWare; is that right?

10 A. Yes.

11 Q. So I take it today 12 years after the fact, you
12 would strike this reference to all copyrights and trademarks
13 except for the trademarks UNIX and UnixWare; is that right?

14 A. Or would have tried to have the agreement
15 reformed or amended, yeah.

16 Q. You wouldn't have left it in, correct?

17 A. No, I wouldn't have left it in.

18 Q. In fact, Mr. Levine, you did review schedule
19 1.1(b) prior to the execution of this Asset Purchase
20 Agreement on September 19th, 1995, didn't you?

21 A. I don't recall.

22 Q. I'm going to hand you what's been marked as
23 Exhibit 202?

24 A. Thank you.

25 Q. For the record this is a fax from you,

1 Mr. Levine, to an attorney named Aaron Alter at the Wilson
2 Sonsini firm that was representing Novell?

3 A. Okay.

4 Q. Do you see that?

5 A. I see.

6 Q. Okay. And this fax cover from you is dated
7 September 18th, 1995, do you see that?

8 A. Correct.

9 Q. In fact, there's a fax transmission line up at
10 the top, it says September 18, 5:20 a.m. USL Legal
11 Department, do you see that?

12 A. I see it.

13 Q. Okay. This is a fax that you sent, isn't that
14 correct?

15 A. I'll accept that I did, I have no reason to think
16 I didn't, but I don't recall it.

17 MR. JACOBS: Your Honor, I would like to move into
18 evidence Novell's Exhibit X3, the fax from Mr. Levine to
19 Aaron Alter at Wilson Sonsini just referred to in the
20 deposition.

21 MR. SINGER: No objection.

22 THE COURT: Exhibit X3 will be admitted.

23 (Whereupon, Defendant's Exhibit X3 was
24 admitted into evidence.)

25 MR. JACOBS: Your Honor, what I propose to do, the

1 witness is going to walk through various pages. So we'll go
2 through his walk through and alternate between the
3 deposition and showing the jury the various pages that he is
4 referring to, okay?

5 THE COURT: All right.

6 Q. Turning to Page 2 you write a note to Aaron Alter
7 and it says, "Aaron: Attached are copies of the following:
8 A suggested markups of certain pages in Schedules 1.1(a) and
9 1.1(b)." Do you see that?

10 A. Yes.

11 Q. Okay. And then turning you to Page 3 of this
12 document there's a draft of Schedule 1.1(a), do you see
13 that?

14 A. Yes.

15 Q. Okay. Do you recognize this as the schedule, a
16 draft of the Schedule 1.1(a) that you were just looking at?

17 A. Yes.

18 Q. And do you see some handwriting about halfway
19 down the page and then on a few of the subsequent pages of
20 Schedule 1.1(a), that's your handwriting; isn't that right?

21 A. Yes.

22 Q. Okay. You reviewed Schedule 1.1(a) prior to the
23 execution of this September 19th, 1995 contract; isn't that
24 right?

25 A. It seems that way, yeah.

1 Q. And you provided some comments on this Schedule
2 1.1(a) draft?
3 A. Yes.
4 Q. And if you turn to Roman V of this Schedule
5 1.1(a), do you see that page?
6 A. Yes.
7 Q. And up in the left you've written in your
8 handwriting "from Schedule 1.1(a)"?
9 A. Yes.
10 Q. And then do you see you've made some comments on
11 Roman V relating to intellectual property?
12 A. Yes.
13 Q. Okay. And you made one change adding the phrase
14 "and to the extent" in between the phrase "trademarks UNIX
15 and UnixWare as," and the phrase, quote, held by seller, do
16 you see that?
17 A. I see it.
18 Q. You left in place "trademarks UNIX and UnixWare"
19 as a type of intellectual property to be an included asset;
20 is that right?
21 A. Yes.
22 Q. Okay. And you did not add any other types of
23 intellectual property to this list of included assets, did
24 you?
25 A. No.

1 Q. You didn't add copyrights?

2 A. Not as a specific item, no.

3 Q. Okay. You did not add UNIX copyrights?

4 A. No.

5 Q. You did not add UnixWare copyrights?

6 A. No.

7 Q. You did not add patents?

8 A. No.

9 Q. Now your cover memo to Mr. Alter of Wilson

10 Sonsini says that you also were attaching suggested markups

11 of certain pages in Schedule 1.1(b), correct? And this is

12 Page 2 of the fax.

13 A. (Reviews.) 1.1(a) and 1.1(b), yes.

14 Q. And turning your attention to the excluded asset

15 draft which is on the page ending 613 of this fax number in

16 the lower right-hand corner, are you there?

17 A. Okay, yeah.

18 Q. Do you see that up in the left-hand corner you've

19 handwritten "from Schedule 1.1(b)"?

20 A. Yes.

21 Q. And do you see that this is your markup of a

22 portion of Schedule 1.1(b) of the excluded assets?

23 A. That's what it appears to be, yeah.

24 Q. And you actually reviewed the Intellectual

25 Property section of the Excluded Assets Provision of

1 Schedule 1.1(b) before the Asset Purchase Agreement was
2 executed on September 19th, 1995; isn't that correct?

3 A. Yeah. Yes.

4 Q. And specifically looking at and commenting on
5 intellectual property you deleted a reference to patent
6 licenses, do you see that?

7 A. Yes.

8 Q. Okay. And do you see that in reviewing a draft
9 Schedule 1.1(b) prior to the execution of the agreement you
10 specifically looked at and commented on the exclusion of all
11 copyrights and trademarks except for the trademarks UNIX and
12 UnixWare?

13 A. Yes.

14 Q. Okay. And do you see that you made only one
15 comment on that line item?

16 A. Yes.

17 Q. Okay. And the comment that you added was at the
18 very end a phrase, quote, as and to the degree held by
19 Seller, quote; is that right?

20 A. That's true.

21 Q. Okay. When you looked at the Excluded Asset
22 Provision prior to the exclusion of the Asset Purchase
23 Agreement, you left in tact the exclusion of all copyrights
24 and trademarks except for the trademarks UNIX and UnixWare;
25 isn't that correct?

1 A. Yes.

2 Q. And you also left in the exclusion of all patents
3 as being a transferred asset; isn't that right?

4 A. Yes.

5 Q. And again you passed your comments on to the
6 outside lawyers of Wilson Sonsini who were representing
7 Novell in the negotiation and drafting of this contract
8 between Novell and Santa Cruz, correct?

9 A. That's correct.

10 Q. And your inclusion of "all copyrights and
11 trademarks except for the trademarks UNIX and UnixWare" in
12 the Excluded Assets provision of Schedule 1.1(b) was also
13 transmitted to Santa Cruz during the negotiations, correct?

14 A. Okay. My -- inclusion it wasn't modified "all of
15 the copyrights and trademarks," yeah.

16 Q. You did not modify the line item "all copyrights
17 and trademarks except for the trademarks UNIX and UnixWare,"
18 correct?

19 A. No.

20 Q. And so when your comments on Schedule 1.1(b) were
21 transmitted to Santa Cruz the line item "all copyrights and
22 trademarks" was included as an excluded asset, correct?

23 A. It was included.

24 Q. And do you recall that one of the types of
25 intellectual property that was excluded was all patents?

1 A. Yes.

2 Q. As you sit here today, do you have any

3 understanding as to whether SCO as part of the Asset

4 Purchase Agreement in 1995 got a license to practice the

5 UNIX patents or any other IP that Novell retained?

6 A. Yes, I do.

7 Q. And what is your understanding today?

8 A. My understanding is similarly to my stand on

9 copyrights that the grant of the whole business carries with

10 it at least licenses under the patents needed to carry on

11 the business to the extent that Novell had them.

12 Q. Do you remember any specific conversations with

13 Ed Chatlos concerning your view that Section 4.16(b) in

14 Novell's dictation right thereunder is somehow limited to a

15 royalty stream?

16 A. No. No, nothing specific.

17 Q. So you just recall in general having a

18 conversation with Ed Chatlos --

19 A. Yes.

20 Q. -- at some point in time?

21 A. Yes.

22 Q. Okay. And 12 years ago you wrote some documents


23 concerning 4.16(b), didn't you?

24 A. Very possibly.

25 Q. And we looked at -- do you have Exhibit 206

C E R T I F I C A T E

I hereby certify that the foregoing matter is
transcribed from the stenographic notes taken by me and is a
true and accurate transcription of the same.


PATTI WALKER, CSR-RPR-CP
Official Court Reporter
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DATED: 3-11-2010

EXHIBIT No. 19

THE SCO GROUP, INC., a Delaware)
corporation,)
Plaintiff,)
vs.) Case No. 2:04-CV-139TS
NOVELL, INC., a Delaware)
corporation,)
Defendant.)
_____)
AND RELATED COUNTERCLAIMS.)
_____)

Jury Trial

REPORTED BY: Patti Walker, CSR, RPR, CP

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1 THE WITNESS: Thank you.

2 THE COURT: Go ahead, Mr. Singer.

3 MR. SINGER: Your Honor, our next witness is Ty
4 Mattingly.

5 The Clerk: Mr. Mattingly, do you want to come
6 forward and I'll swear you in.

7 THE WITNESS: Sure.

8 (Ty Mattingly, Plaintiff's witness, sworn)

9 The Clerk: Thank you. Please be seated.

10 And if you would please state and spell your name for the
11 court.

12 THE WITNESS: Ty D. Mattingly. It's T-Y, D.,
13 M-A-T-T-I-N-G-L-Y.

14 THE COURT: Thank you.

15 DIRECT EXAMINATION

16 BY MR. SINGER:

17 Q Good morning, Mr. Mattingly. I'm Stuart Singer, one of
18 the attorneys for the SCO group. Would you briefly describe
19 your educational background.

20 A Sure. Graduated, and came up to Brigham young university
21 in 1980, and graduated from B.Y.U. in '87 with a degree out of
22 the college of Engineering in the design engineering world.
23 And then took a job with IBM after that, and spent 14 months
24 going through IBM's advanced education program, where
25 basically spent 14 months learning about computers and

1 A Yeah. David Bradford is the person that I approached
2 when I wanted to leave Novell -- excuse me -- IBM and go to
3 Novell, and he actually set up my interviews with Jim Bills
4 back in those days and really helped me get into Novell and
5 mentored me a lot through Novell.

6 Q Let's go back to the time when you joined Novell.

7 A I also know Dana Russell over there, who is their C.F.O.

8 Q You're friends with Mr. Russell as well?

9 A Yes.

10 Q Going back to the time when you joined Novell, can you
11 describe your responsibilities?

12 A Sure. When I first joined Novell, I was a product
13 manager working in the marketing group.

14 Q Did your responsibilities change at some point?

15 A Yeah. After about a year Ray Norda, who was the Chairman
16 and CEO, grabbed me and asked me to start working for him. So
17 I spent the next couple of years working in the Chairman's
18 Office on various projects.

19 Q When Robert Frankenberg became CEO, did you continue in
20 that role working closely with the Chairman?

21 A Yes, I had. I had the same role and stayed working with
22 Bob Frankenberg for probably a year-and-a-half.

23 Q Was that your position at Novell in 1995?

24 A No. I'd left working for the Chairman's Office and took
25 a role as Vice-President of Corporate Development Strategic

1 Relationships.

2 Q Who did you report to at that time?

3 A Duff Thompson.

4 Q Were you involved in the sale of the Unix business to
5 Santa Cruz in 1995?

6 A Yes.

7 Q Do you recall who the principal negotiators were in that
8 transaction?

9 A Sure. The principal negotiators on the ground and living
10 in California for, you know, two months were myself and Ed
11 Chatlos, with me having the relationship and kind of the high
12 level strategy aspects of it, and Ed Chatlos, who was very
13 detailed oriented, assigned from the business unit, to work
14 out all of the details.

15 Q Did you attend negotiation sessions during those two
16 months that you were living in California?

17 A Sure, daily.

18 Q Was that the reason you were in California?

19 A Correct.

20 Q How personally involved was Mr. Bradford, the General
21 Counsel, in the negotiations?

22 A Well, Dave was the General Counsel of Novell at the time,
23 but he was not involved on the daily basis and was not on the
24 ground in California.

25 Q Are you familiar with a gentleman named Tor Braham, who

1 is an attorney from the Wilson Sonsini firm?

2 A Sure. Tor did a lot of work for us, very good guy.

3 Q How involved was Mr. Braham in the negotiations?

4 A You know, I don't recall that Tor was that involved on

5 the ground with the negotiations. When we finished coming to

6 a meeting of the minds, then docs were turned over, and that's

7 when the legal team took over for the last period of time, and

8 Tor would have been a key component in that.

9 Q When the lawyers came in to document the transaction, had

10 the principal business terms of the deal been agreed upon?

11 A Yes.

12 Q What was your Understanding from the negotiations as to

13 how much of the Unix business was being sold?

14 A Well, it was the majority of it. I mean we sold the

15 business. We acquired it from USL, and we were selling the

16 business to accomplish some very high level strategic

17 objectives for Novell and hopefully for the greater

18 industry.

19 Q What was not being sold?

20 A Oh, certain functions, like SCO was acting as Novell's

21 agent to collect some of the existing SVRX binary royalties,

22 and so that was retained, and SCO acted as the agent to

23 collect it, and I think the distribution was 95/5 towards

24 Novell.

25 Q Other than that, was the remainder of the business, the

1 Unix and UnixWare business, sold --

2 A Absolutely.

3 Q -- To Santa Cruz?

4 A Absolutely.

5 Q During the months of negotiations that you attended, did
6 anyone from Novell ever say that we are selling the Unix
7 business but we are retaining the copyrights?

8 A No.

9 Q Would that have been consistent with your understanding
10 of the deal which you negotiated, holding back the
11 copyrights?

12 A Holding back the copyrights would not have been
13 consistent.

14 Q Let's advance to the time of the Board of Directors
15 Meeting to approve the sale in September of 1995. What
16 responsibility, Mr. Mattingly, did you have in connection with
17 Board of Directors meetings at Novell?

18 A Well, prior to that time I had attended all of the
19 meetings when I worked for Ray Norda and Bob Frankenberg. At
20 this time where I worked for Duff Thompson I did not go to all
21 of the Board meetings, but I did present at a number of them
22 when they involved transactions that I was involved with.

23 Q Who was responsible for preparing Board materials for the
24 Board of Directors to review prior to the meeting?

25 A Dave Bradford as the General Counsel and Corporate

1 document that you received previous to the Asset Purchase
2 Agreement being signed?

3 A. If it is a draft, then that would have been
4 previous to it.

5 Q. Is this the copy of the draft that you looked at?

6 A. It would have been a paper or online to an
7 electronic format.

8 MR. BRENNAN: Your Honor, I do move the admission of
9 Defendant's 045.

10 MR. SINGER: No objection.

11 THE COURT: It will be admitted.

12 (Whereupon, Defendant's Exhibit 045 was received
13 into evidence.)

14 MR. BRENNAN: May I now present it on the ELMO, Your
15 Honor?

16 THE COURT: You may.

17 MR. BRENNAN: Thank you.

18 Q. (By Mr. Brennan) Now, we have just displayed to
19 the jury through this technology the first page of
20 Defendant's Exhibit 045. And I would now like to turn to a
21 portion of that document which is entitled Schedule 1.1(b)
22 Excluded Assets and in particular, I will show that first,
23 I'll try to keep my fingers out of the screen, but do you
24 see that page there?

25 A. Yes.

1 Q. And on the version of the document that you see,
2 it says, let me lower it just a little bit, do you see where
3 it says "draft" stamped on the top?
4 A. Yes.
5 Q. I know it is a little difficult to see but there
6 appears to be a handwritten date to the right 9/16/95; do
7 you see that?
8 A. Yes.
9 Q. Is that your handwriting?
10 A. I don't think so.
11 Q. Does this suggest to you that you had possession
12 of this document at least as early as September 16th, 1995?
13 A. That would be reasonable.
14 Q. And so did you understand that in this draft at
15 least that what is set forth in this schedule Excluded
16 Assets were Novell assets that would not transfer to Santa
17 Cruz Operation under the Asset Purchase Agreement then being
18 considered?
19 A. Yes.
20 Q. I'm now going to turn to Page 2 of that draft
21 Schedule 1.1(b). Excuse my big hands there. You will see,
22 I know it is a little difficult, but there is a Roman
23 numeral five Intellectual Property. Are you able to make
24 that out on the screen?
25 A. Yes.

1 Q. And it has three parts; correct?

2 A. Yes.

3 Q. One is labeled capital letter A and it says

4 patent licenses, parenthesis, i.e. Pike and all others

5 associated with the UNIX System, in parenthesis, do you see

6 that?

7 A. Yes.

8 Q. Did you understand that the draft under

9 consideration several days before the Asset Purchase

10 Agreement was signed was to exclude all patent licenses?

11 A. Sure.

12 Q. That is what it says, right?

13 A. That is what it says.

14 Q. And the draft that you had in your possession

15 several days before the final agreement was signed had that

16 exclusion, right?

17 A. That is correct.

18 Q. And September 16th, 1995 would have been before

19 the Novell Board of Directors meeting that was held on

20 September 18th, 1995, correct?

21 A. Yes.

22 Q. So you would have had in your possession at least

23 two days before the Novell Board of Directors meeting a

24 draft of the Asset Purchase Agreement that listed at least

25 these proposed exclusions from transfers of assets by Novell

1 to Santa Cruz, correct?

2 A. Yes.

3 Q. Let's then look at Item B, all copyrights and
4 trademarks, except for the trademarks UNIX and UnixWare. Do
5 you see that?

6 A. Yes.

7 Q. So is it correct then that as with the patent
8 licenses you had in your possession a draft of the Asset
9 Purchase Agreement at least two days before the board
10 meeting that listed as excluded assets, that is assets that
11 would not be transferred to Santa Cruz Operation, a document
12 that showed all copyrights and trademarks except for the
13 trademarks UNIX and UnixWare?

14 A. If that was delivered to me on the date that the
15 -- somebody wrote 9/16 then I would have had it at least two
16 days before the board meeting.

17 Q. So even before you went into the board meeting,
18 you would have had access to a draft of the Asset Purchase
19 Agreement that clearly stated that -- no, let's put it back
20 just so we have no mistake here, clearly would have stated
21 that contemplated to be excluded are all copyrights and
22 trademarks except for the trademarks UNIX and UnixWare;
23 right?

24 A. As long as it wasn't delivered at the board
25 meeting and actually copied on the 16th.

1 Q. Let's take a look at what has been marked as
2 defendant's, excuse me, SCO Exhibit 570. This is the
3 September 15th, 1995 package.
4 And is it your testimony that you received a copy of
5 this document?
6 A. Yes.
7 Q. And when did you receive it?
8 A. Well, again, it is dated September 15th, so I
9 would assume that that being a Friday, I might have received
10 that on the 15th.
11 Q. And did you review that document at the time you
12 received it?
13 A. I'm sure I did.
14 Q. Let's look at the -- now you were not a member of
15 the Board of Directors of Novell, were you?
16 A. No.
17 Q. Never were?
18 A. No.
19 Q. You weren't a voting member of the board, right?
20 A. No.
21 Q. And in the board meeting that you attended on
22 September 18th, 1995 it was not your purpose to vote on any
23 resolution, right?
24 A. No.
25 Q. So let's look at this package that you were given

1 a copy of. It says, if we can highlight the first full
2 paragraph, "dear board member" and then the first full
3 paragraph. It says quote, "we are in the process of
4 negotiating long-term business relationships with SCO and
5 Hewlett-Packard for the purpose of strengthening UNIX on the
6 Intel Platform."

7 Now let me just pause right here. Did you believe as
8 of September 15th that it was the intention of Novell to
9 sell its entire UNIX and UnixWare business to SCO?

10 A. Yes.

11 Q. Let's go back then to Exhibit 570, the next
12 sentence. Quote, "one of the key steps in this process is
13 the sale of a portion of our UnixWare business to The Santa
14 Cruz Operation."

15 Now certainly when you read this document you
16 understood that what was being considered was a sale of a
17 portion of the business, right?

18 A. Well, yes, because we were retaining the royalty
19 stream from the SVRX royalties.

20 Q. In fact, that is referenced in the next sentence,
21 right?

22 A. Yes.

23 Q. And that next sentence which is a parenthetical
24 reads, "for example, we will be retaining our traditional
25 royalty stream from UNIX SVRX source code which we -- which

1 A. Yes.

2 Q. Did Mr. Young speak at the meeting?

3 A. I'm sure he would have spoken.

4 Q. What did he say?

5 A. I don't remember.

6 Q. You just don't remember what any of these

7 individuals said?

8 A. I do not.

9 Q. Are you aware that at the Board of Directors

10 Meeting, that David Bradford and Larry Sonsini reviewed the

11 terms of the Asset Purchase Agreement?

12 A. I am sure they would have.

13 Q. So they --

14 A. That was the purpose of the meeting.

15 Q. They would have gone through the terms of the

16 agreement, right?

17 A. Yes.

18 Q. And so to your recollection, the Board of

19 Directors would have had the benefit of two attorneys, Larry

20 Sonsini and David Bradford going through the terms of the

21 Asset Purchase Agreement; right?

22 A. Correct.

23 Q. And the Asset Purchase Agreement that was before

24 the board included the exclusions of all copyrights and

25 trademarks except the trademarks UNIX and UnixWare, right?

1 A. That is what the document states.

2 Q. Well, do you remember that?

3 A. I remember that as I read it.

4 Q. So now looking at the minutes of the Board of

5 Directors Meeting, your memory is refreshed, and you recall

6 that Mr. Bradford, general counsel, Larry Sonsini, a member

7 of the board, and also a senior partner at Wilson Sonsini

8 went through with the board the terms and conditions of the

9 Asset Purchase Agreement, right?

10 A. Well, I think that they would have reviewed the

11 high-level terms and conditions in the Asset Purchase

12 Agreement. They would have not gone through the agreement

13 and gone on a line-by-line basis.

14 Q. Well, do you remember one way or the other?

15 A. I don't, but I guarantee you they wouldn't have

16 done that.

17 Q. You guarantee it, but you just don't remember?

18 A. I don't remember. But we would never take a 50,

19 60 page document and review that on a line-by-line basis.

20 Q. Now --

21 A. Never in the four years that I attended board

22 meetings would we do that.

23 Q. Would the most important aspects of the

24 transaction be reflected in the resolution of the board?

25 A. They should be.

1 Q. So to your understanding, the most critical parts
2 of the Asset Purchase Agreement put before the board would
3 have been those that the board reached specific resolution
4 on, right?

5 A. Yes.

6 Q. So then let's look at the actual resolutions
7 reached by the board. They're on Page 2. And we're going
8 to focus on the third paragraph where it says, "Novell will
9 retain." If I could have that highlighted. Our patient
10 jury has seen this language several times. "Novell will
11 retain." So if I understand your testimony correctly, the
12 most important parts of the transaction would be part of the
13 resolutions, right?

14 A. Yes.

15 Q. It says here as part of resolved, quote, "Novell
16 will retain all its patents, copyrights and trademarks
17 (except for the trademarks UNIX and UnixWare)" right?

18 A. Yes.

19 Q. And that -- that is almost verbatim if not
20 exactly the language that was in the draft Asset Purchase
21 Agreement that you and other people attending the board
22 meeting received in advance of the board meeting, right?

23 A. Correct.

24 Q. There was no surprise, right?

25 A. Well, I think once again, as I talked about when

1 you were trying to badger me about the \$50,000,000, you
2 can't take a rifle shot in a two month negotiation and a 60
3 page document and try and zero in on that. This is
4 referring to the fact that Novell bundled a number of its
5 products that it retained that weren't part of this Asset
6 Purchase Agreement. And Novell obviously would retain that
7 intellectual property, those copyrights and trademarks with
8 those products that they retained. That is what this is
9 stating.

10 Q. What I'm trying to find out from you is the
11 following. First, there was -- there was no surprise
12 foisted on the board with language that would appear in the
13 ultimate signed Asset Purchase Agreement that would state
14 that the excluded assets would include all copyrights and
15 trademarks except the trademarks UNIX and UnixWare. Would
16 you agree with that?

17 A. In a perfect world that should be the case.

18 Q. But would you agree with me that the members of
19 the board and other participants in the meeting, including
20 yourself, were provided with the draft of the asset purchase
21 agreement before the board meeting that included the very
22 language I have been focusing on?

23 A. Yes.

24 Q. So would you agree with me then that there was no
25 attempt by Mr. Bradford or anyone else to try to somehow

1 me. You believe that under the Asset Purchase Agreement
2 Novell retained patents, right?

3 A. Yes.

4 Q. Did it transfer any patents?

5 A. I don't believe so unless there were some that
6 were possibly relevant to UNIX.

7 Q. And your -- the basis for your belief that Novell
8 retained patents and didn't transfer any is premised on
9 what?

10 A. Well, I knew that we had acquired this patent
11 from USL around overlapping windows. And if we had that
12 patent, there was a company by the name of Microsoft that
13 had a pretty nice business in overlapping windows that I
14 felt like we should have executed our rights against that.

15 Q. Well, were you aware that under the Asset
16 Purchase Agreement signed on September 19th, 1995 that one
17 of the excluded assets was all patents?

18 A. I am now.

19 Q. What do you mean you are now?

20 A. We just read that earlier.

21 Q. Well, just so we're clear, what we looked at
22 earlier was a draft unsigned version of the Asset Purchase
23 Agreement. Let's actually look at the final version of the
24 Asset Purchase Agreement signed on September 19th, 1995 and
25 we'll look in particular at the final version of Schedule

1 1.1(b) that was entered into by the parties on
2 September 19th, 1995.

3 Here it says, and again I'll represent to you that
4 this is from the executed version of the final Asset
5 Purchase Agreement signed on September 19th, 1995. And
6 under intellectual property it says, "all copyrights and
7 trademarks except for the trademarks UNIX and UnixWare," do
8 you see that?

9 A. Yes.

10 Q. And that is exactly the same language that
11 appeared in the draft that you got before the board meeting;
12 right?

13 A. Yes.

14 Q. But there also is an exclusion of all patents;
15 right?

16 A. Correct.

17 Q. So is this what tells you that no patents
18 transferred?

19 A. Yes.

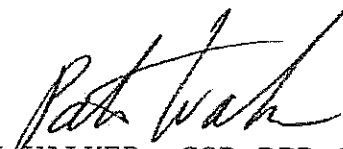
20 Q. Isn't this also what tells you that no copyrights
21 or trademarks except for the trademarks UNIX and UnixWare
22 transferred?

23 A. Well, once again, in a rifle shot you would
24 assume that.

25 Q. Well, are you aware of any other provision that

C E R T I F I C A T E

I hereby certify that the foregoing matter is
transcribed from the stenographic notes taken by me and is a
true and accurate transcription of the same.


PATTI WALKER, CSR-RPR-CP
Official Court Reporter
350 South Main Street, #146
Salt Lake City, Utah 84101
801-364-5440

DATED: 3-12-2010

EXHIBIT No. 20

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware)

corporation,)

Plaintiff,)

vs.) Case No. 2:04-CV-139TS

NOVELL, INC., a Delaware)

corporation,)

Defendant.)

AND RELATED COUNTERCLAIMS.)

BEFORE THE HONORABLE TED STEWART

March 23, 2010

Jury Trial

REPORTED BY: Patti Walker, CSR, RPR, CP

350 South Main Street, #146, Salt Lake City, Utah 84101

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1

2

I N D E X

3

Witness

Examination By

PAGE

4

James Tolonen

Mr. Brennan (Direct)

1999

5

Mr. Hatch (Cross)

2038

6

Mr. Brennan (Redirect)

2090

7

Mr. Hatch (Recross)

2100

8

Allison Amadia

Mr. Brennan (Direct)

2103

9

Mr. Normand (Cross)

2137

10

Mr. Brennan (Redirect)

2183

11

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1 EXHIBITS RECEIVED INTO EVIDENCE:

2 Plaintiff's:

3 754

2062

4 503

2101

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10

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12 Defendant's:

13 N-8

1999

14 T-34

2038

15 X-4

2093

16 B-6

2096

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1 \\

2 \\

3 \\ (Proceedings under separate cover.)

4 THE WITNESS: Thank you.

5 THE COURT: Mr. Brennan.

6 MR. BRENNAN: Yes. Novell wishes to call Ms.
7 Allison Amadia.

8 ALLISON AMADIA

9 Having been duly sworn, was examined

10 and testified as follows:

11 THE WITNESS: Allison Amadia, A-l-l-i-s-o-n,
12 A-m-a-d-i-a.

13 DIRECT EXAMINATION

14 BY MR. BRENNAN

15 Q. Good morning, Ms. Amadia.

16 A. Good morning.

17 Q. So we're clear, have you previously been known by your
18 maiden name?

19 A. I have.

20 Q. What is that?

21 A. It is Lisben.

22 Q. Would you please tell us your occupation.

23 A. I am an independent legal consultant and my speciality
24 is technology licensing.

25 Q. In addition to your consulting work that you do, you

1 are involved in other activities such as teaching and other
2 professional pursuits?

3 A. Yes. I am a part-time lecturer at Santa Clara Law
4 School and I teach a technology licensing class there.

5 Q. Please summarize for us your educational background.

6 A. Yes. I received a bachelor of arts from the University
7 of California at Davis in political science, and a juris
8 doctorate degree from the University of Pennsylvania.

9 Q. After you completed your law degree, did you then go to
10 work for a federal district judge?

11 A. I did. I worked for Judge William B. Shubb in the
12 Eastern District of California.

13 Q. That would be a District Court judge such as the judge
14 that we have here, Judge Stewart?

15 A. Yes.

16 Q. Have you ever worked for Novell?

17 A. I did work for Novell from 1995 to 1997.

18 Q. During that span that you were employed by Novell, what
19 was your position or capacity at Novell?

20 A. I was in-house counsel.

21 Q. What were your job duties or responsibilities while you
22 worked for Novell as in-house counsel?

23 A. Basically supporting the business division and in
24 licensing contracts and other contracts that were assigned
25 to me through the legal department.

1 Q. Where was your place of business or physical location?

2 A. San Jose.

3 Q. Did Novell have an office in San Jose when you worked
4 there?

5 A. Yes.

6 Q. Are you familiar with the asset purchase agreement
7 between Novell and the Santa Cruz Operation which was
8 entered into in 1995?

9 A. I am familiar with it.

10 Q. How is it that you have become familiar with the asset
11 purchase agreement?

12 A. I became familiar with it when I was an employee at
13 Novell. I was working on a contract, a licensing agreement
14 involving I.B.M. and Novell and Santa Cruz, and reviewed the
15 asset purchase agreement back at that time when we were
16 working on that transaction and also making amendments to
17 the asset purchase agreement.

18 Q. Are you familiar as well with what is known as
19 amendment number two to the asset purchase agreement?

20 A. Yes. I was the lead negotiator and drafts person on
21 behalf of Novell with respect to amendment number two.

22 Q. So is it fair to say that you were essentially one who
23 wrote it?

24 A. Yes. Well, wrote it and also responded to drafts of it
25 from my counterpart at Santa Cruz.

1 Q. Can you tell the jury how amendment number two came
2 about?

3 A. Yes. I was working on a royalty buy-out license
4 between Novell and I.B.M. when I was employed by Novell, and
5 at the time that that royalty buy-out license was executed,
6 and Santa Cruz became aware of it, they objected to it. So
7 we began to negotiate a three party settlement, so to speak,
8 between Santa Cruz, I.B.M. and Novell with respect to
9 I.B.M.'s rights as a buy-out to the SVRX license.

10 At the time that we were negotiating that agreement,
11 which was finally executed and is referred to as amendment
12 number X, we also discussed and eventually agreed to future
13 buy-out rules. Novell and Santa Cruz were trying to
14 identify in the future if there were opportunities for
15 buy-outs how that would be conducted so that there wouldn't
16 be any future litigation on that matter. That is how we
17 started with amendment number two.

18 Q. Did you have any communications or discussions with any
19 legal representatives of the Santa Cruz Operation with
20 respect to either amendment X that you have identified or
21 with what became amendment number two to the asset purchase
22 agreement?

23 A. Yes. I had many face-to-face and phone conversations
24 with Steve Sabbath, who was the general counsel of Santa
25 Cruz at the time, and with respect to both the amendments

1 number X and two.

2 Q. This Mr. Sabbath, who you said was the general counsel
3 of Santa Cruz Operation, did he ever make any suggestion or
4 statement to you regarding the ownership of copyrights under
5 the asset purchase agreement?

6 A. Yes, he did. In the context of trying to negotiate the
7 terms for the future buy-outs, he contacted me by phone and
8 said, more or less, oh, by the way, we need to also amend
9 the asset purchase agreement because there has been a
10 clerical error in the original agreement and it did not
11 include the transfer of copyright ownership, so this is
12 another thing that we need to fix was what he said.

13 Q. So when Mr. Sabbath made reference to some clerical
14 error, did you have any understanding as to what he was
15 referencing?

16 A. Yes. I mean, I had some understanding, but I basically
17 told him at the time to let me go and review the documents
18 and do some research and I will get back to you.

19 Q. You were not involved in the actual draftsmanship of
20 the initial asset purchase agreement?

21 A. No, I was not.

22 Q. So your involvement with amendment number two began
23 after the initial asset purchase agreement was entered into.
24 Is that fair?

25 A. Correct.

1 would mark up the paragraph and send him my proposed
2 language to that effect.

3 Q. Did you, in fact, prepare such a revision?

4 A. I did.

5 Q. I would like to show you what is in evidence as Exhibit
6 N-8. First, let's turn to page number 2 of Exhibit N-8.

7 There appears to be a signature under the heading Novell.

8 Do you see that?

9 A. I do.

10 Q. Do you have any understanding as to whose signature
11 that is?

12 A. Yes, I do. That is James Tolonen.

13 Q. Who did you understand Mr. Tolonen to be?

14 A. He was the executive vice president and C.F.O. of
15 Novell at the time.

16 Q. Did you have any involvement with Mr. Tolonen relative
17 to amendment number two?

18 A. I did. Mr. Tolonen was named the executive basically
19 in charge of the amendment number X and the amendment number
20 two, and in brokering a settlement with respect to amendment
21 number X and any changes that were going to be made on
22 amendment number two. I had business discussions with him
23 about what we were to do with amendment number two.

24 Q. In any of your communications with Mr. Tolonen, did he
25 suggest to you that Novell ought to agree to transfer

1 ownership of the UNIX copyrights to Santa Cruz Operation?

2 A. No, he did not.

3 Q. Did anyone at Novell ever suggest to you that in
4 connection with amendment number two that Novell ought to
5 transfer ownership of UNIX copyrights to Santa Cruz
6 Operation?

7 A. No, no one did.

8 Q. If we could go back now to the first page of the
9 exhibit. Let's highlight the language in Section A.

10 Just so you know, the jury has had the benefit of
11 seeing this several times, but this is the first time we
12 have had a chance to talk together in this trial, Ms.
13 Amadia.

14 Section A reads as follows: With respect to Schedule
15 1.1-B of the agreement, titled excluded assets, Section 5,
16 subsection A shall be revised to read all copyrights and
17 trademarks, except for the copyrights and trademarks owned
18 by Novell as of the date of the agreement required by SCO to
19 exercise its rights with respect to the acquisition of UNIX
20 and UnixWare technologies. However, in no event shall
21 Novell be liable to SCO for any claim brought by any third
22 party pertaining to said copyrights and trademarks.

23 Now, did you understand that this was the final
24 language agreed to between Novell and Santa Cruz Operation?

25 Correct?

1 A. Correct.

2 Q. Under this language was it your intent as commenter or
3 drafts person to effect the transfer of UNIX copyrights by
4 Novell to Santa Cruz Operation?

5 A. No, that was not my intent.

6 Q. Why is it that you had no intent by virtue of amendment
7 number two to transfer ownership of the UNIX copyrights to
8 Santa Cruz Operation?

9 A. Well, there was no business decision to make that
10 transfer. So as the legal negotiator I am going to follow
11 the business decision and the business decision was not to
12 transfer copyright as to the original A.P.A., and from my
13 research, and certainly as to amendment number two.

14 Q. Now, with respect to the initial asset purchase
15 agreement, including amendment number one and amendment
16 number two, which you participated in drafting, were you
17 aware of any business reasons why Novell would want to
18 retain actual ownership of the copyrights particularly in
19 the context of a potential insolvency or transfer or --

20 A. Well, there is language in the asset purchase agreement
21 that I reviewed that explains that Novell retained a royalty
22 stream from the existing code. There is reference to Novell
23 retaining an equitable interest in those SVRX licenses. So
24 there is some indication from the language of the A.P.A.
25 that Novell had a very strong interest in retaining the

1 copyright ownership to protect that royalty stream.

2 Q. Based upon your understanding of the language of the
3 initial asset purchase agreement and your conclusion that it
4 did not transfer the copyright ownership by Novell to Santa
5 Cruz Operation, did you believe that you would have had to
6 obtain approval or authorization from someone senior at
7 Novell before you could change the asset purchase agreement
8 to transfer copyright ownership?

9 A. Absolutely.

10 Q. Why did you hold that understanding?

11 A. Well, that is just, you know, standard business
12 practice. I mean, something that significant would need to
13 be agreed to on a business level and a very high level
14 business level before anyone would make that change.

15 Q. Were you ever authorized by anyone at Novell to modify
16 the asset purchase agreement so that it would transfer
17 ownership of the copyrights to Santa Cruz Operation?

18 A. No, I was not.

19 Q. Did you ever ask for such authorization?

20 A. No, I did not.

21 Q. So when you prepared the language that actually was
22 approved by Novell and signed by Mr. Tolonen, was your
23 understanding that it was also approved by Mr. Sabbath at
24 Santa Cruz Operation?

25 A. Yes. The language that we were just looking at was

1 THE COURT: Yeah. We'll let him finish before you
2 go to your cross.

3 MR. BRENNAN: Your Honor, if I could have
4 permission just to tell Ms. Amadia that I'm going to ask that
5 question.

6 THE COURT: Do that now while Ms. Malley is
7 bringing in the jury.

8 MR. BRENNAN: Thank you.

9 (Whereupon, the jury returned to the court
10 proceedings.)

11 THE COURT: Ladies and gentlemen, Mr. Brennan has
12 been given permission to ask some questions. And so though he
13 had said that he only had three more to go, this is
14 specifically at the Court's permission and not a request. And
15 don't hold it against him if he's going to ask a few more
16 questions to this witness.

17 MR. BRENNAN: Thank you. You just made my day,
18 Your Honor.

19 Q. BY MR. BRENNAN: What I'd like to have you do,
20 Ms. Amadia, is focus back in time when Mr. Steve Sabbath,
21 general counsel of Santa Cruz Operation, had approached you
22 making a request that the asset purchase agreement be amended,
23 and then what you undertook to do relative to deciding how to
24 respond. And I believe you indicated that you spoke with
25 Tor Braham, who was the lawyer at Wilson Sonsini. Do you

1 recall that?

2 A. I do, and I did. I spoke with Tor Braham, because
3 after reviewing the asset purchase agreement I -- it seemed
4 very clear that copyright ownership was not intended to be
5 transferred, and I wanted to understand from the drafter and
6 the lead negotiator himself whether that was some kind of
7 clerical error as it had been presented to me by Mr. Sabbath
8 or whether that was intentional. He indicated very clearly
9 that that was intentional. There were good reasons for that.
10 And he directed me not to modify it.

11 Q. And when you say he directed you not to modify it,
12 what did you understand him to mean in that regard?

13 A. He said, don't change the schedule of excluded
14 assets such that the copyright ownership would transfer to
15 Santa Cruz.

16 MR. BRENNAN: Thank you, Your Honor. I appreciate
17 your indulgence.

18 THE COURT: Mr. Normand?

19 CROSS-EXAMINATION

20 BY MR. NORMAND:

21 Q. Good afternoon, Ms. Amadia.

22 A. I'm sorry. I didn't hear you.

23 Q. Good afternoon.

24 A. Oh, good afternoon.

25 Q. Now, you've testified that you perceived your job

1 in 1996 as to follow the business decision; is that correct?

2 A. Correct.

3 Q. And when you were determining what the intent was
4 under the asset purchase agreement, you didn't call any of the
5 business negotiators of the asset purchase agreement; correct?

6 A. No, I did not.

7 Q. Now, you perceived your job as an attorney in 1996
8 to follow the intent of business negotiators; correct?

9 A. Well, I didn't negotiate the original asset
10 purchase agreement, so I perceived my job as to follow the
11 business intent of the business people in making any changes
12 to that with respect to Amendment Number 2.

13 Q. You said you called Tor Braham; correct?

14 A. Yes. And I spoke with Jim Tolonen, as well, who,
15 as I said in my earlier testimony, is the lead business person
16 involved in the transaction of Amendment X and Amendment
17 Number 2.

18 Q. And with respect to your discussion with
19 Mr. Braham, if Mr. Braham was wrong about what the business
20 negotiators had intended under the APA, then what he told you
21 about that intent was wrong; correct?

22 A. Yeah, I suppose so; although I also received
23 direction from Jim Tolonen and from inhouse Novell counsel
24 that was consistent with what Tor told me. So I didn't have
25 one source for that understanding.

1 Q. And if what Mr. Tolonen had told you about what he
2 regarded as the intent under the APA did not reflect the
3 intent of the business negotiators in 1995, then you had a
4 misunderstanding of the business intent; correct?

5 A. I -- yeah. My -- when I testified as to following
6 the direction of the business intent, it was as to changes or
7 amendments to Amendment Number 2.

8 Q. Your understanding --

9 A. Okay. So I was going to follow the direction of
10 the business intent with respect to the modification to the
11 asset purchase agreement.

12 Q. Let me make sure I understand. I heard you say you
13 had three bases in which you concluded that you thought you
14 understood in 1996 was the intent of the APA on the issue of
15 copyright transfer; correct?

16 A. Uh-huh (affirmative).

17 Q. One, your discussion with Mr. Tolonen; two, your
18 discussion with Mr. Braham; and, three, your review of the
19 asset purchase agreement; is that fair to say?

20 A. Yes.

21 Q. Now, you recognize that there was an issue with the
22 copyright exclusion language in the asset purchase agreement;
23 correct?

24 A. Can you say that again? I recognize that --

25 Q. That there was some issue with the language of the

1 copyright exclusion in the asset purchase agreement; correct?

2 A. I was told by Steve Sabbath that there was an issue
3 with the copyright exclusion.

4 Q. But you recognized that there was an issue with the
5 clarity of the language; correct? Otherwise you wouldn't have
6 agreed to enter into any amendment at all.

7 A. No, I didn't think there was any issue at all with
8 the copyright exclusion. I thought it was very clear in the
9 asset purchase agreement in Schedule 1.1(a) and
10 Schedule 1.1(b) that copyright actually was excluded.

11 Q. So your testimony is that this paragraph in
12 Amendment Number 2 serves no purpose?

13 A. Oh, no. It serves a purpose.

14 Q. What purpose did it serve?

15 A. Well, understanding the context, we are trying to
16 negotiate Amendment Number X with Santa Cruz and IBM.
17 Santa Cruz has threatened litigation. They're telling us we
18 need to agree to their terms on the buyout provision with IBM
19 and future buyouts in order to avoid litigation. And then
20 they throw in this alleged clerical error.

21 And so in that context, trying again to settle this
22 dispute and be able to move forward and let us run our
23 perspective businesses, I saw the purpose of Amendment
24 Number 2 with regard to altering the copyright section as
25 appeasing them to make them understanding that we have no

1 intention of suing them for copyright infringement for their
2 rights to develop this code and run their business that they
3 acquired. So again, I modified that section to affirm the
4 licenses that were already in the APA.

5 Q. So your view was, your testimony is there was no
6 lack of clarity in the original APA, but you signed Amendment
7 Number 2, anyway?

8 MR. BRENNAN: Objection; mischaracterizes her
9 statement.

10 MR. NORMAND: Your Honor, she can answer these
11 questions.

12 THE COURT: Well, number one, she did not sign.

13 MR. BRENNAN: That was my objection.

14 THE WITNESS: I did not think there was any lack of
15 clarity in the original APA.

16 Q. BY MR. NORMAND: But you did recommend to
17 Mr. Tolonen that he sign the language in Amendment Number 2
18 that changed the original asset purchase agreement; correct?

19 A. I didn't view it as a change. I viewed it as
20 language to clarify it.

21 Q. But it did change it; correct?

22 A. I still don't believe it changed it.

23 Q. You don't think it's a new language?

24 A. It can have new language to shed additional light
25 without changing the underlying meaning, and that was what I

1 some obligation if it wanted copyrights to go back to Novell
2 and ask Novell to send it copyrights; is that right?

3 A. Well, to the extent that they believe what was
4 required in order for them to exercise their rights under the
5 APA was full copyright ownership, then they would need to do
6 something beyond this. But I guess that's what you mean by
7 process.

8 Q. Yeah.

9 A. Yeah.

10 Q. It would be fair to describe that is a form of
11 process; right?

12 A. I don't think that anyone -- well, I can't speak
13 for Steve Sabbath, but I did not believe that the original APA
14 required for Santa Cruz to have full copyright ownership with
15 all of the rights that are incident to full copyright
16 ownership. So I didn't view this as something that was going
17 to trigger a process, because what I viewed it as is an
18 affirmation of their licenses in the original APA. So I
19 didn't expect anything to come out of it in terms of a process
20 of someone making any claim that they required copyright
21 ownership.

22 Q. But your view was that there was a process that had
23 to unfold before Santa Cruz could obtain copyright ownership;
24 is that right?

25 A. Like I said, my reading of the APA, my discussions

1 with Tor Braham and Jim Tolonen indicated to me that
2 Santa Cruz had certain rights with respect to the technology
3 and that the underlying copyright ownership was retained by
4 Novell for good reason. And I did not anticipate that Santa
5 Cruz needed any more than those license rights, an affirmation
6 of those rights in order to do their business.

7 So, no, I think in my mind this cleared up any
8 doubt as to whether or not they had the right to go and run
9 the business, and that was all they needed was those license
10 rights.

11 Q. So I think I understand.

12 Your testimony is if Santa Cruz did need them, if
13 they were required, then they got them?

14 A. No, not exactly.

15 Q. So there's no process. And you say they didn't get
16 them at the time.

17 A. I don't believe that they needed them, and I don't
18 believe that they got them. If, in fact, they thought they
19 needed them, I would imagine they would need to come back and
20 have some form of amendment actually granting them with
21 retroactive rights and amended bill of sale and everything
22 tantamount to a transfer. This was never a transfer in my
23 mind. So, you know, I feel like I'm saying the same thing.

24 Q. Now, this language in Paragraph A doesn't say
25 anything about Santa Cruz' obligations to come back to Novell;

1 correct?

2 A. No.

3 Q. It doesn't have any language that refers to any
4 process; correct?

5 A. Not that I can see.

6 Q. And we've gone through the fact that Paragraph A of
7 Amendment 2 revises the excluded assets schedule of the asset
8 purchase agreement; correct?

9 A. Yes.

10 Q. And there's no other provision of the excluded
11 assets schedule that sets out any process; correct?

12 A. Not that I'm aware of.

13 Q. Let me ask you it a different way, Ms. Amadia.
14 Before Amendment 2 when Santa Cruz actually thought it did not
15 own the copyrights, it already had the right to ask Novell to
16 transfer them; correct?

17 A. I don't believe so. No.

18 Q. No. Let's look at Section 4.12 of the APA. And
19 let's pull out that language at the top, Mr. Calvin.

20 So, Ms. Amadia, this is from the APA Section 4.12,
21 states:

22 Each party hereto, at the request of another
23 party hereto, shall execute and deliver such other
24 instruments and do and perform such other acts and
25 things as may be necessary or desirable for

1 effecting completely the consummation of this
2 agreement and the transactions contemplated
3 hereby.

4 Do you see that language?

5 A. Yes.

6 Q. Do you see the language in the second line that
7 says, at the request of another party?

8 A. Yes.

9 Q. So under this provision Santa Cruz could have made
10 a request to Novell for the copyrights if they believed they
11 did not own them; correct?

12 A. No, I don't believe so.

13 Q. You think that Santa Cruz literally could not ask
14 Novell in the form of a request, would you, please, transfer
15 copyrights to us?

16 A. I think they could ask, and I think they did ask.
17 I don't think Novell was obligated by this provision to grant
18 them.

19 Q. Well, I'm --

20 A. I don't believe the original APA granted them, and
21 this provision addresses following acts in order to consummate
22 the agreement and the transactions contemplated hereby. I'm
23 reading the actual language. And the agreement was an asset
24 purchase agreement of certain assets which did not include --

25 Q. Well, I appreciate all of that, I do, and maybe my

1 question wasn't clear enough.

2 A. Okay.

3 Q. I'll try to ask a clear question, and see if we can
4 get a yes or no. And if you can't let me know.

5 A. Okay.

6 Q. But my question was, didn't Santa Cruz have a right
7 to make a request to Novell? Whatever Novell did in response,
8 Santa Cruz could have made a request?

9 A. Do I have to say yes or no, or can I --

10 Q. If you can't say yes or no you can explain why.

11 A. Absolutely. Whether or not this language was in
12 the agreement there's no law that prohibits Santa Cruz from
13 making that request.

14 Q. And Novell could have said no in response to the
15 question; right?

16 A. Correct.

17 Q. And none of that in your view changed after
18 Paragraph A of Amendment Number 2 was put in place; correct?

19 A. Correct.

20 Q. So Paragraph A of Amendment Number 2 never had
21 anything in Section 4.12; correct?

22 A. Well, again, to the extent there's any document or
23 further assurance that they requested in relation to the
24 licensees that they received under the original APA, then I
25 think this section would require Novell to respond and perform

1 in good faith with respect to those licenses. I believe they
2 still had that obligation under the original APA. So I guess
3 the answer is yes, there is no additional, there's no
4 additional obligations that came about as a result of the
5 Amendment Number 2.

6 Q. Now, you don't think that Steve Sabbath after he
7 executed Amendment Number 2 thought he got nothing out of that
8 paragraph amendment?

9 A. No, I don't. I don't think he got nothing. I
10 think he thought he got what he needed, which would clear
11 license rights to go forward, to use the code, to develop it,
12 to, you know, own modifications to it, to do all of the things
13 they intended to do to acquire the assets.

14 Q. You think he thought he had clear license rights in
15 the form of the agreements that don't use the word "license"?

16 A. Yeah.

17 Q. Now, let's look at the draft language that we
18 talked about that Mr. Sabbath sent to you. And I think that's
19 in, what was put in at T34. Let's pull up that Paragraph A.

20 I think you said Mr. Sabbath told you initially in
21 the beginning of the discussions that the purpose of the
22 Amendment was to clarify that the UNIX and UnixWare copyrights
23 had transferred; correct? I'm not saying you agreed with it,
24 but I'm saying that was your understanding of what he was
25 proposing; right?

1 A. Yes.

2 Q. Let's look at this language. The language that
3 you're saying he sent to you said:

4 All copyrights and trademarks, except for the
5 copyrights and trademarks owned by Novell as of
6 the date of this Amendment Number 2, which pertain
7 to the UNIX and UnixWare technologies and which
8 SCO has acquired hereunder.

9 Do you see that language?

10 A. Yes.

11 Q. You spent a little time with that language with
12 counsel, and unfortunately for the jury I'm going to ask you
13 about grammar a little bit.

14 The first part of this language says, all
15 copyrights and trademarks; correct?

16 A. Correct.

17 Q. So if the language stopped there, then what you
18 would have is a situation where all copyrights and trademarks
19 had been excluded; is that fair to say?

20 A. That's fair to say.

21 Q. The language goes on, and it begins with the word
22 "except," so that's an exception; correct?

23 A. Correct.

24 Q. All copyrights and trademarks except for the
25 copyrights and trademarks owned by Novell as of the date of

1 this Amendment Number 2.

2 Now, that would have said that Santa Cruz acquired
3 all of Novell's copyrights and trademarks; correct?

4 A. Yes. If it had stopped there?

5 Q. Yes.

6 A. Yes.

7 Q. Now, that's not what either you or Mr. Sabbath
8 intended; correct?

9 A. It's not what he signed and what Novell signed,
10 either, yeah.

11 Q. But Mr. Sabbath didn't intend to have anything
12 clarify that Santa Cruz had acquired Novell's NetWare
13 copyrights; correct?

14 A. Correct.

15 Q. So this was, first two parts of this sentence,
16 they're simply inaccurate?

17 A. They're what?

18 Q. Inaccurate.

19 A. Well, it wasn't ever intended to be read alone. So
20 as a draftsman I take offense to it being called
21 inaccurate, even though I didn't draft it. Steve drafted it.
22 But it was never intended to be read --

23 Q. I was hoping you wouldn't be offended. I mean,
24 Mr. Sabbath --

25 A. It was intended to be read in context and

1 particularly in the context of a complete sentence, which it
2 was written, but, yeah.

3 Q. So we agree -- you know, I'm going to get to that
4 third part, and I'm not trying to exclude it. But do we
5 agree, if you read the first two parts what that language
6 literally says is Santa Cruz had acquired all of Novell's
7 copyrights and trademarks. And you didn't understand that's
8 what Mr. Sabbath intended; correct?

9 A. No. Yeah.

10 Q. And then the last part explains the second part.
11 The last part says, which pertain to the UNIX and UnixWare
12 technologies and which SCO has acquired hereunder.

13 Now, all of Novell's copyrights and trademarks did
14 not contain the UNIX and UnixWare technologies; correct?

15 A. Correct.

16 Q. There were Novell copyrights and trademarks that
17 pertained to NetWare; correct?

18 A. Yes.

19 Q. So this language that Mr. Sabbath sent you actually
20 didn't even reflect his intent, did it?

21 A. Well, if it didn't reflect his intent, I don't know
22 why he presented it.

23 Q. But what I'm getting at --

24 A. I think he did. He was saying that he was
25 intending to transfer copyright ownership with respect to all

1 copyrights which pertained to UNIX and UnixWare that they
2 claim to have acquired under the original APA.

3 Q. Well, I guess I'm focussing on the comma, and
4 here's the grammar, the comma in the second line of the
5 sentence, and, comma identifies, does it not, it identifies
6 the copyrights and trademarks owned by Novell as of the date
7 of the amendment as pertaining to the UNIX and UnixWare
8 technologies? And that was not accurate, was it?

9 A. Comma error, but yeah. It probably should have
10 been that pertain, not which pertain.

11 Q. Now, you agreed that if Novell had signed the
12 language that Mr. Sabbath sent to you, that would have
13 provided that all of the UNIX and UnixWare copyrights were
14 transferred; correct? And again, I'm not saying you did sign
15 it, but --

16 A. Again, if I were Steve Sabbath, I would not have
17 presented this language in and of itself and expected to
18 retain copyright ownership from this language.

19 Q. Let me ask it differently. The reason you didn't
20 sign this language, I thought I heard you testify earlier,
21 because your view was if you had signed it, it would have made
22 very clear that Santa Cruz had acquired all the UNIX and
23 UnixWare copyrights.

24 A. I don't know that I said that.

25 MR. BRENNAN: I want to state an objection. That

1 mischaracterizes the witness' prior testimony.

2 Q. BY MR. NORMAND: Well, if it does, explain that.

3 A. No. I think what I said, or I can at least say now
4 what I meant to say is it would have created an ambiguity that
5 there was an intent to transfer copyright ownership.

6 Q. And you think that the language that you ultimately
7 settled on with Mr. Sabbath contained no ambiguity?

8 A. I think it did contain some ambiguity. And if
9 you're a transactional attorney and you understand the way
10 these transactions work in the context of settling a
11 threatened litigation, sometimes you're willing to live with a
12 little bit of ambiguity in order to get a deal done. And I
13 don't think that the ambiguity was such that at the end of the
14 day it wasn't clear.

15 I mean, like I said, in a perfect world I never
16 would have accepted Steve Sabbath's original language and even
17 modify the excluded asset schedule. I would have started with
18 basically some statement affirming the license grant. But
19 knowing Steve Sabbath and who he was and what his reaction was
20 going to be to a whole modification of his proposed language,
21 that was not going to bring the deal forward and get the
22 parties on to do their businesses, which is where we all
23 wanted to be. So I tried to work within the confines of his
24 initial drafts.

25 Q. Let me ask you a different question in that vein.

1 And if we could go back, Mr. Calvin, to the
2 excluded assets. Now pull up that language on Roman V.

3 So you agree, Ms. Amadia, that under the APA
4 Santa Cruz did acquire trademarks of UNIX and UnixWare;
5 correct?

6 A. Yes.

7 Q. Okay. And you said that Amendment Number 2
8 clarified the asset schedule of the APA; correct?

9 A. Yes. Well, yes.

10 Q. So Amendment Number 2 confirmed that Santa Cruz had
11 acquired UNIX and UnixWare trademarks; correct?

12 A. Can I actually see the language on Amendment
13 Number 2 at the same time, or can somebody present me with
14 that document?

15 Q. Sure. I think we can stack it up there.

16 A. Because I don't want to misspeak. Section A of
17 Amendment Number 2. That would be great.

18 Q. So as you look at it, I thought I heard you say
19 earlier that Amendment Number 2 was designed to clarify the
20 excluded assets schedule. And it was meant to confirm what
21 assets Santa Cruz had and had not acquired; correct?

22 A. Uh-huh (affirmative).

23 Q. So Amendment Number 2 was not designed to say that
24 Santa Cruz had not acquired the UNIX and UnixWare trademarks;
25 correct?

1 A. Yes. At the time that this section was being
2 modified, trademarks wasn't really top of line for either
3 party. And -- but I don't think -- it certainly didn't intend
4 to take them away.

5 Q. So the language now in Paragraph A, I hope I'm not
6 testing the jury's patience, but the language says that what
7 was transferred to Santa Cruz were the copyrights and
8 trademarks owned by Novell as of the date of the agreement
9 required for SCO to exercise its right with respect to the
10 acquisition of UNIX and UnixWare technologies.

11 Do you see that language?

12 A. Yes.

13 Q. And you agree with me that that language identifies
14 the UNIX and UnixWare trademarks as having been transferred;
15 correct?

16 A. It doesn't expressly identify them. But to the
17 extent that the UNIX and UnixWare trademarks were required for
18 SCO to exercise its rights under the APA, they were
19 transferred through Amendment -- well, their transfer was
20 clarified in Amendment 2. They actually were transferred in
21 the APA.

22 Q. And you said in response to my question earlier
23 that Paragraph A did not change that; correct?

24 A. Yes.

25 Q. So the way Paragraph A identifies UNIX and UnixWare

1 trademarks is by identifying them as required for SCO to
2 exercise its rights with respect to the acquisition of UNIX
3 and UnixWare technologies; correct?

4 A. Yes. Well, the UNIX and UnixWare trademarks were
5 also listed in the schedule of included assets.

6 Q. Now, but this language pertains to the excluded
7 assets schedule; right?

8 A. Right.

9 Q. And we've agreed, haven't we, that there are at
10 least some intellectual property rights that are not
11 specifically identified in the included assets schedule in the
12 APA?

13 A. Yeah. Again, I view intellectual property rights
14 as you can dissect them into individual rights and licenses.
15 So certainly we're saying under trademark law and under
16 copyright law there were certain rights that SCO got licenses
17 to or I guess acquired with respect to trademarks.

18 Q. Well, when you say, I guess acquired, I want to be
19 clear.

20 A. Yeah.

21 Q. This paragraph --

22 A. Again, it all ties -- the whole purpose of
23 Amendment Number 2 in this language was to tie it back to the
24 original assets purchase agreement.

25 Q. So Santa Cruz got the UNIX and UnixWare trademarks

1 because they were acquired for its business; correct?

2 A. If they were acquired for its business, then they
3 got them.

4 Q. Well, that's not what I heard you say. I want to
5 make sure we're being clear. You said that they did get them
6 under the original APA; correct?

7 A. Yes.

8 Q. And you said that this Paragraph A does not change
9 that; correct?

10 A. Yes.

11 Q. Okay. Now, this Paragraph A on its face does not
12 draw any distinction between trademarks and copyrights;
13 correct?

14 A. Correct.

15 Q. So if there are copyrights that are required for
16 SCO to exercise its rights, like the UNIX and UnixWare
17 trademarks, they were transferred; correct?

18 A. Yeah.

19 Q. Ms. Amadia, you testified very briefly to the
20 negotiations that were among Novell and IBM and Santa Cruz in
21 the first half of 1996; at least that's how I heard it; is
22 that a fair description?

23 A. Uh-huh (affirmative).

24 Q. And that arose in a situation where Novell was
25 claiming to act on behalf of Santa Cruz; correct?

1 A. Correct.

2 Q. Novell had entered into an agreement with IBM and
3 said in the agreement, we're acting on behalf of Santa Cruz;
4 correct?

5 A. Yes.

6 Q. And after Santa Cruz found out about that
7 agreement, Santa Cruz was upset; correct?

8 A. Correct. Well, Santa Cruz was collecting the
9 royalty stream under all SVRX licenses including that
10 agreement. So the way they found out about it was Novell's
11 agreement, it prevents them from being ready to receive the
12 check.

13 Q. But Santa Cruz did object to the agreement that
14 Novell had negotiated with IBM on behalf of Santa Cruz;
15 correct?

16 A. They did. They ultimately agreed to an amendment
17 that revised that, and that was Amendment Number X.

18 Q. And there was really a dispute among Novell and
19 Santa Cruz throughout a lot of 1996; correct?

20 A. I'm only aware of the dispute regarding
21 Amendment X.

22 Q. That's what I meant. It lasted several months;
23 correct?

24 A. It did last several months. I don't know about the
25 year language. But it did last several months.

1 Q. And to your knowledge, throughout that whole
2 dispute with Santa Cruz, Novell never claimed to own the UNIX
3 and UnixWare copyrights, did it?

4 A. The issue never came up. Nobody made any claims as
5 to ownership.

6 Q. And there came a time when IBM who had entered into
7 that agreement with Novell earlier became involved; in other
8 words, there came a time when all three companies were
9 involved in the discussion; correct?

10 A. Yeah. The ultimate amendment was signed by all
11 three companies.

12 Q. And do you recall whether during that process among
13 the three companies IBM insisted that Santa Cruz should agree
14 to lift restrictions on IBM's software agreement because SCO
15 could protect itself through its copyrights?

16 A. No.

17 Q. You don't recall any discussion on that?

18 A. I don't recall that.

19 Q. Let me show you to see if we can refresh your
20 recollection. SCO 123.

21 And, Ms. Amadia, I wanted to -- let's identify it
22 at the top. I can't really speak to the internal substance of
23 the document because it's not in. But do you see the title of
24 the document?

25 MR. BRENNAN: Do you have a copy that I may see?

C E R T I F I C A T E

I hereby certify that the foregoing matter is
transcribed from the stenographic notes taken by me and is a
true and accurate transcription of the same.



PATTI WALKER, CSR-RPR-CP
Official Court Reporter
350 South Main Street, #146
Salt Lake City, Utah 84101
801-364-5440

DATED: 3-23-2010

EXHIBIT No. 22

1 IN THE UNITED STATES DISTRICT COURT
2 DISTRICT OF UTAH, CENTRAL DIVISION
3

4 THE SCO GROUP, INC., a Delaware)

5 corporation,)

6 Plaintiff,)

7 vs.) Case No. 2:04-CV-139TS

8 NOVELL, INC., a Delaware)

9 corporation,)

10 Defendant.)

11 _____)

12 AND RELATED COUNTERCLAIMS.)

13 _____)

14
15 BEFORE THE HONORABLE TED STEWART
16 -----

17 March 25, 2010

18 Jury Trial
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22
23

24 REPORTED BY: Patti Walker, CSR, RPR, CP

25 350 South Main Street, #146, Salt Lake City, Utah 84101

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I N D E X

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18	Christine Botosan	Mr. Hatch (Direct)	2560
19		Mr. Brennan (Cross)	2577
20		Mr. Hatch (Redirect)	2586

1 EXHIBITS RECEIVED INTO EVIDENCE:

2 Plaintiff's:

3 9 to SCO 639, pages 39783 through 39801 2400

4 89 2411

5 88 2412

6 123 2545

7

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13 Defendant's:

14 C-33 2478

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1 thought you may be interested to know we are at that point.

2 You probably didn't believe that the end is near.

3 Mr. Braham, if you would please come forward, and

4 I will remind you that you are still under oath.

5 Mr. Singer, if you would, please, as well.

6 CROSS-EXAMINATION (Cont.)

7 BY MR. SINGER:

8 Q Good morning, Mr. Braham.

9 A Good morning.

10 Q Am I correct that while you were at Wilson Sonsini,
11 Novell was your major client?

12 A Not my only -- I had several large clients. It was one
13 of the two that I did the most work with.

14 Q Would you say it's your largest client?

15 A No. I think my -- I had another one that was a little
16 bit larger.

17 Q Novell was also a principal client of the firm?

18 A Yes, it was.

19 Q Now several years after that you left Wilson Sonsini to
20 become an investment banker, correct?

21 A That's correct.

22 Q You currently work with Deutsche Bank; is that right?

23 A Yes.

24 Q And you work in the technology sector of Deutsche
25 Bank's practice?

1 A Typically companies have thresholds that certainly
2 enable day-to-day transactions to occur without the board.
3 No company can operate with having the board involved in all
4 the day-to-day matters. When it comes to mergers and
5 acquisitions and dispositions, many companies require all of
6 those to go to the board, and other companies have
7 thresholds where very small mergers and acquisitions could
8 be done, immaterial deals done without board approval. But
9 above a certain threshold or in transactions that would be
10 visible and might be interesting to the investing public,
11 those transactions require board approval.

12 Q So if we're trying to understand the process by which
13 board approval was actually given for this transaction, what
14 document would one look to?

15 A The minutes.

16 MR. JACOBS: Let's take another look at Z-3, Mr.
17 Lee.

18 BY MR. JACOBS:

19 Q Z-3 is the minutes of the board meeting -- the minutes
20 of the meeting of the board of directors of Novell, Monday
21 September 18th, 1995.

22 MR. JACOBS: If we go to the second page, Mr. Lee,
23 and the resolution where copyrights are mentioned.

24 BY MR. JACOBS:

25 Q So, Mr. Braham, in terms of whether the negotiating

1 team representing Novell had authority to exclude the
2 copyrights from the asset purchase agreement transaction,
3 what does this board of directors resolution signify to you
4 as someone experienced in representing Novell in
5 transactions?

6 A Well, it expressly states that the company would retain
7 the patents, copyrights and trademarks, other than the
8 trademark UNIX and UnixWare, which combined with the fact
9 that the asset purchase agreement is incorporated by
10 reference into the minutes makes it completely clear that
11 the board approved and directed that the transaction be done
12 with these terms.

13 Q What about all the input from somebody like Ed Chatlos
14 or Ty Mattingly, how would that relate as a matter of
15 corporate governance to the board approval that was
16 obtained?

17 A It would not be relevant.

18 Q Even the CEO, Mr. Braham, let's assume that Mr.
19 Frankenberg had it in his head at some point that the
20 copyrights would transfer, would what was in his head be
21 superior or inferior to what the board actually approved?

22 A It would be inferior. It would not matter. The board
23 approval speaks for the company in actions where a
24 transaction that is submitted, required to be submitted and
25 evaluated by a board.

1 Q At the beginning of your cross-examination yesterday
2 Mr. Singer asked you about Amendment No. 2. Do you recall
3 that?

4 A Yes.

5 MR. JACOBS: Could we have N-8 up, please.

6 BY MR. JACOBS:

7 Q Now he asked you whether you understood that Amendment
8 No. 2 -- I forget his exact words -- replaced the language
9 in the excluded assets at subsection A. Do you recall that
10 question and answer?

11 A Yes.

12 Q If you look at the as of date in the first paragraph of
13 Amendment No. 2, do you see that?

14 A Yes.

15 Q It reads, as of the 16th day of October, 1996. Do you
16 see that?

17 A Yes.

18 Q So what does that signify to you in terms of the
19 effective date of the replacing effect of Amendment No. 2
20 and the language of the asset purchase agreement?

21 A This would be effective as of the 16th of October,
22 1996.

23 Q Now as a transactional lawyer, if one wanted to draft
24 an amendment like this --

25 THE COURT: Mr. Singer.

1 MR. SINGER: There is no foundation. They
2 objected yesterday and, in fact, this witness wasn't
3 involved in this amendment.

4 THE COURT: I am going to sustain the objection.
5 You are, in effect, eliciting expert testimony from this
6 witness.

7 MR. SINGER: I move to strike the testimony that
8 he just elicited on that.

9 MR. JACOBS: Your Honor, Mr. Singer asked the
10 witness whether he understood that this language replaced
11 the language of the asset purchase agreement.

12 THE COURT: Mr. Jacobs, I have been quite
13 concerned about two or three of your questions now because,
14 again, you are having Mr. Braham act as an expert, in
15 effect. I would discourage you from doing that again.

16 BY MR. JACOBS:

17 Q Mr. Braham, in the asset purchase agreement that was
18 negotiated in September 19th and signed September 19th,
19 1995, did it anticipate that the actual assets would
20 transfer on execution of that agreement on September 19th,
21 1995?

22 MR. SINGER: Those are issues of law that the
23 Court can direct the jury on to the extent it's relevant.

24 MR. JACOBS: He's the negotiator of the agreement.

25 THE COURT: I'll allow you to answer the question.

1 THE WITNESS: It anticipated that the assets would
2 transfer upon the close and the execution of closing
3 documents.

4 BY MR. JACOBS:

5 Q What kind of closing documents did you contemplate in
6 negotiating the asset purchase agreement?

7 A A bill of sale.

8 Q What did you contemplate by way of a bill of sale?
9 What would that document look like.

10 A It would be a piece of paper --

11 MR. SINGER: Outside the scope of my cross. This
12 is just more direct that he wishes he had done yesterday.

13 MR. JACOBS: As you wish, Your Honor.

14 THE COURT: I will sustain that objection.

15 BY MR. JACOBS:

16 Q Mr. Singer asked you some questions about the back and
17 forth with Santa Cruz about the copyright exclusion. Do you
18 recall that?

19 A Yeah. With Mr. Higgins, yes.

20 Q And as you were exchanging the drafts with Mr. Higgins
21 and with the Brobeck team, the Santa Cruz team, what was
22 your understanding of the copyrights that would be retained
23 pursuant to the excluded asset schedule?

24 A All of them.

25 Q All of them then extant, all of them into the future?

1 THE COURT: May this witness be excused, counsel?

2 MR. SINGER: He may be excused by us.

3 MR. JACOBS: Yes, Your Honor.

4 THE COURT: Mr. Braham, that means you do not need
5 to worry about being re-called, but I would request that you
6 not discuss your testimony with any other witness in this
7 case or in the presence of any other witness or communicate
8 in any way your testimony.

9 Thank you, Mr. Braham.

10 THE WITNESS: Thank you.

11 THE COURT: We have to take a little recess here,
12 ladies and gentlemen. If you want to stand up and stretch
13 your legs, you may do so.

14 Ready to proceed?

15 MR. BRENNAN: Novell wishes to call as its next
16 witness Mr. David Bradford.

17 THE COURT: Mr. Bradford, if you would pause for
18 one second and raise your right hand and Ms. Malley will
19 administer the oath to you.

20 DAVID BRADFORD,

21 Having been duly sworn, was examined

22 and testified as follows:

23 THE CLERK: If you would please state and spell
24 your name for the Court.

25 THE WITNESS: David Bradford. D-a-v-i-d, last

1 name Bradford, B-r-a-d-f-o-r-d.

2 DIRECT EXAMINATION

3 BY MR. BRENNAN:

4 Q Good morning, Mr. Bradford.

5 Could you please tell us what your current business
6 position is?

7 A I'm chairman of the board of a company called
8 Fusion-io.

9 Q Where is that company located?

10 A Based here in Salt Lake City, Utah.

11 Q Could you summarize your educational background for us?

12 A Sure. Going back many years ago, I graduated from high
13 school in 1969 in a little town in Red Lodge, Montana. And
14 then I came down to Brigham University. Served an LDS
15 mission. After that, I came back to BYU, finished my
16 undergraduate degree in political science in 1974 at BYU.
17 They just started a new law school at BYU, so I dove into
18 that and became a graduate of the BYU law school in the
19 second class, and that was in 1977. I then went and
20 practiced law for some years in southern California. I also
21 got a master's in business administration in the early '80s
22 from Pepperdine University.

23 Q That's in Malibu, California?

24 A Yeah.

25 Q Have you ever worked for Novell?

1 A Yes.

2 Q For what period of time did you work for Novell?

3 A That was a long time, 1985 to 2000, almost 15 years.

4 Q What positions did you hold while you were at Novell?

5 A When I first joined Novell, my position was corporate
6 counsel. Shortly thereafter, probably six months in, I
7 became the general counsel for the company. And I held the
8 position of general counsel the entire rest of the period I
9 was at Novell into July of 2000 when I left. Over the
10 years, I had varying assignments and other responsibilities,
11 corporate security for the company, corporate business
12 development, government relations, those sorts of things
13 reported to me as well.

14 Q In general, what were your duties and responsibilities
15 as general counsel and corporate secretary?

16 A Well, certainly as the chief legal officer of this
17 corporation, I had a responsibility to review contracts,
18 negotiate contracts, be involved on a day-to-day basis to
19 ensure that the legal aspects of Novell were protected and
20 so forth. I was also secretary to the board of directors,
21 and in that capacity I recorded and wrote essentially the
22 board minutes and attended all the board meetings for Novell
23 for those 15 years.

24 Q I would like to have you focus your attention on a
25 period 15 years ago, 1995. Do you recall playing any role

1 in the preparation of the asset purchase agreement between
2 Novell on the one hand and Santa Cruz Operation on the other
3 hand?

4 A Yes.

5 Q Has it been necessary for you to, in essence, look at
6 some documents to try to remember what happened 15 years
7 ago?

8 A It's been a busy time, and I stay busy in my day-to-day
9 life. So yes, I have gone back and looked at the asset
10 purchase agreement and the board minutes, and so forth and
11 so on, that I prepared and was involved with at the time.

12 Q Do you think without reviewing some of those documents
13 you would have as clear a recollection without that review?

14 A No. I'm appreciative of the fact that I did document
15 things at the time.

16 Q What were your general duties with respect to this
17 asset purchase agreement we made reference to?

18 A Well, in many ways over the years whenever we would do
19 a transaction at Novell, I kind of acted as a point person
20 for the company to involve the technology people, to involve
21 the financial people, and to kind of bring the team together
22 as we would negotiate these deals. We did hundreds of deals
23 over the years at Novell. And, you know, this was, you
24 know, an important one, but certainly not as big or broad as
25 some of the other transactions that we did in terms of

1 mergers and acquisitions and so forth.

2 Q In connection with these business transactions, did
3 you, as Novell's general counsel, look to outside legal
4 firms to assist in that work?

5 A Sure.

6 Q Was there a primary outside counsel that you looked to?

7 A Yes. Wilson Sonsini Goodrich & Rosati was the primary
8 outside counsel for Novell during many of its years,
9 corporate existence, and worked closely with guys like Larry
10 Sonsini, who was on the Novell board, as well as Tor Braham
11 and others at the Wilson Sonsini firm. It's an outstanding
12 law firm and probably the best law firm that we could find.

13 Q What was your relationship with Tor Braham in the 1995
14 time period?

15 A I began working with Tor probably -- I want to say in
16 the early '90s. As we did various transactions together, I
17 looked at Tor as kind of chief outside drafter of contracts
18 assisting with negotiation of agreements. And so I deferred
19 a lot over the years to Tor and relied on him a great deal
20 to help protect our legal positions as a company.

21 Q In connection with your work with Mr. Braham, did you
22 trust him?

23 A Absolutely.

24 Q Did you find that he would follow your instructions as
25 you gave them to him?

1 A Yes. There was a trusting relationship. Whenever
2 trust exists, things accelerate and you get deals done more
3 quickly and so forth. So there was definitely a
4 relationship of trust between Tor and me.

5 Q Again, I recognize it's been 15 years ago now, but
6 thinking for a moment about the Santa Cruz Operation
7 transaction, do you recall any other Novell senior
8 executives that had any role in reviewing documents or
9 writing input on that transaction?

10 A Certainly Jim Tolonen. Jim was the chief financial
11 officer at Novell, was intimately involved in these sorts of
12 transactions. I relied on Jim's financial expertise a lot
13 as we would work through these deals.

14 You know, going back in time, gosh, Bob Frankenberg was
15 the CEO of the company at the time, so Bob would have been
16 involved to some degree.

17 Duff Thompson, when we acquired WordPerfect in July, I
18 think mid 1994, Duff was the general counsel at WordPerfect
19 corporation. And when Novell and WordPerfect corporation
20 came together, I retained the legal function for the
21 combined entity Novell-WordPerfect, and Duff did business
22 development. And Duff was with the company actively for
23 about a six-month period of time following the
24 Novell-WordPerfect acquisition. So Duff would have been
25 involved peripherally in the deal.

1 Ed Chatlos, as I've gone back and looked at some of the
2 memoranda and so forth, Ed was involved. He was based out
3 in New Jersey. So I didn't see a lot of Ed, but he
4 certainly would have been involved.

5 Q Focusing on the transaction itself and based upon your
6 recent review of some of the documents, do you recall there
7 being any particular points of issue regarding this
8 transaction in terms of special deal points that came to
9 mind?

10 A Well, certainly as you look through the documentation,
11 you look through the contract itself, you look through what
12 was stated in the board minutes that were drafted
13 contemporaneously with the close of this deal, absolutely
14 that, you know, it was very clear that Novell had retained
15 the patents, the copyrights, et cetera, associated with the
16 UNIX rating system.

17 Q You mentioned the board meeting minutes. Do you recall
18 whether the Santa Cruz transaction was approved by Novell's
19 board of directors?

20 A Yes.

21 Q How is it that you are able to remember that now 15
22 years later?

23 A Going back and looking at my board minutes.

24 Q You say your board minutes. Who actually prepared
25 those minutes?

1 A I prepared the minutes.

2 Q Was that because you were the secretary to the board of
3 directors?

4 A That's correct.

5 Q What is the purpose of minutes of meetings of the board
6 of directors? I ask this in a generic sense.

7 A Sure. It's certainly to document particular
8 transactions and so forth. And it should be emphasized
9 that, you know, not everything that happens in a board
10 meeting gets documented, you know, to the nth degree. I
11 think it's important to note that material aspects of any
12 transaction -- a large transaction get voted through the
13 board of directors, but --

14 Q Again, we're in this transaction talking about a
15 meeting that was held almost 15 years ago, what are the
16 benefits of board meetings looking back in time?

17 A Well, fortunately, I've got those things and the
18 company has those things as a corporate -- permanent
19 corporate record to accurately reflect what occurred at that
20 point in time. That's why the board minutes are kept.

21 Q What was your habit and practice, say in 1995, with
22 respect to preparing the board meeting minutes relative to
23 the actual holding of the meeting itself?

24 A Well, I would, prior to the meeting, give deep thought
25 to -- I would prepare the agenda to the meeting, outline

1 what was going on. I would typically sit down with the CEO
2 and kind of review -- at that time it would have been Bob
3 Frankenberg, to say, Bob, here's kind of what we're going
4 through, these are the things we've been working on, et
5 cetera. Here's, you know, eight things that we need to
6 cover for the board. We typically meet every two months,
7 every three months, something like that. So I would prepare
8 a draft of the minutes prior to the meeting, just for my own
9 use.

10 Then once the meeting was held, then I would again
11 memorialize those minutes and keep them and then place them
12 in a binder as a permanent record for the corporation.

13 Q Were the meeting minutes that you prepared approved by
14 the board at a subsequent meeting?

15 A Yes.

16 Q Now if I could direct your attention -- you probably
17 see this on the screen.

18 MR. BRENNAN: I would like to show the witness
19 Exhibit Z-3.

20 BY MR. BRENNAN:

21 Q And these are the minutes of the meeting of the board
22 of directors of Novell, Inc., Monday, September 18th, 1995.

23 A Okay.

24 Q Do you recognize this document?

25 A Sure. This looks like something that I would have

1 prepared at the time.

2 MR. BRENNAN: If we could go down to page 3 of
3 Exhibit Z-3 and highlight the signature.

4 BY MR. BRENNAN:

5 Q Is that your signature that you recognize?

6 A Yes.

7 Q Now that you've looked back 15 years later, do these
8 minutes appear to reflect the boards' consideration and
9 approval of the Santa Cruz Operation transaction?

10 A Sure. I've had a chance to look through those.

11 Q What I would like to do is focus for a moment on page 2
12 of Exhibit Z-3. Just by word of explanation, this jury,
13 over this three-week trial, has seen this document several
14 times. You've not been here before today, so I won't spend
15 too much time, but I do want to ask you a few questions
16 about what appears to be in the middle of the document under
17 the heading resolved, there are three paragraphs.

18 A Sure.

19 Q And in the first paragraph under resolved reads that
20 the board of directors of this corporation, Novell, hereby
21 determine that is it in the best interests of this
22 corporation and its shareholders to enter into an asset
23 purchase agreement with the Santa Cruz Operation, or SCO.

24 Do you see that?

25 A Yes.

1 Q Did you understand that what was before the board at
2 that time was the asset purchase agreement that was
3 ultimately signed by the parties?

4 A Yes.

5 Q And if we could then skip down to the third paragraph
6 that reads, quote, Novell will retain all of its patents,
7 copyrights and trademarks, except for the trademarks UNIX
8 and UnixWare, royalty-free, perpetual, worldwide license
9 back to UNIX and UnixWare for internal use and resale in
10 bundled products, Tuxedo and other miscellaneous, unrelated
11 technology. Do you see that?

12 A Yes.

13 Q Was it your understanding, based now upon your review
14 of these minutes 15 years after the actual meeting, that the
15 board of directors of Novell agreed that the asset purchase
16 agreement would be such that it would retain all of its
17 patents, copyrights and trademarks, except for the
18 trademarks UNIX and UnixWare?

19 A Absolutely.

20 Q Now there has been reference made in this case to an
21 Amendment No. 2 to the asset purchase agreement. Did you
22 have any direct involvement in Amendment No. 2 to the asset
23 purchase agreement?

24 A You know, not on a day-to-day basis. We had an
25 attorney out in California, Allison, that worked in our

1 legal department. Because she was based in California, as
2 was our CFO, Jim Tolonen, they handled that Amendment No. 2.

3 Q To your knowledge, was Amendment No. 2 ever brought
4 before the Novell board of directors?

5 A Not to my recollection.

6 Q Do you have any understanding as to why Amendment No. 2
7 was not brought to the attention of the board of directors
8 of Novell?

9 MR. SINGER: Objection, no foundation. He wasn't
10 involved in Amendment No. 2.

11 MR. BRENNAN: Your Honor, he testified that he
12 attended virtually every board meeting. He probably would
13 have a sense --

14 THE COURT: I will allow the witness to answer the
15 question.

16 THE WITNESS: I'm sorry. I didn't hear that.

17 MR. BRENNAN: I'll restate the question.

18 BY MR. BRENNAN:

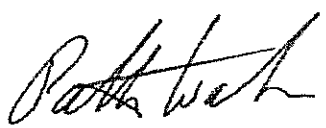
19 Q Do you have any understanding as to why Amendment No. 2
20 was not brought before the board of directors of Novell?

21 A Not precisely, but, you know, typically things that are
22 of a material nature to the corporation, important aspects
23 of our day-to-day operation, those things that are material
24 get brought to the board of directors for approval.

25 Q Were you ever asked to review and approve and sign a

C E R T I F I C A T E

I hereby certify that the foregoing matter is
transcribed from the stenographic notes taken by me and is a
true and accurate transcription of the same.


PATTI WALKER, CSR-RPR-CP
Official Court Reporter
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DATED:

3-25-2010

EXHIBIT No. 23

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH, CENTRAL DIVISION

3
4 THE SCO GROUP, INC., a Delaware)

5 corporation,)

6 Plaintiff,)

7 vs.) Case No. 2:04-CV-139TS

8 NOVELL, INC., a Delaware)

9 corporation,)

10 Defendant.)

11 _____)

12 AND RELATED COUNTERCLAIMS.)

13 _____)

14
15 BEFORE THE HONORABLE TED STEWART

16 -----

17 March 26, 2010

18 Jury Trial

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24 REPORTED BY: Patti Walker, CSR, RPR, CP

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1 During your deliberations, you are able as a group
2 to set your own schedule for deliberations. You may
3 deliberate as late as you wish or recess at an appropriate
4 time set by yourselves. You may set your own schedule for
5 lunch and dinner breaks.

6 However, I do ask that you notify the Court by a
7 note when you plan to recess for the evening.

8 You have now been instructed on the law, ladies
9 and gentlemen. Again, a copy of the instructions, what I
10 just read to you, will accompany you to the jury room.

11 It is now time for closing statements, and we'll
12 begin with SCO. And because SCO is the plaintiff in the
13 case and, as I just instructed you, has certain burdens to
14 carry by way of the weight of evidence and such, the
15 plaintiffs have the opportunity to go both first and last in
16 their closing statements, meaning that SCO will go ahead now
17 with part of its closing. We'll then hear from Novell, and
18 then SCO will be given the last word.

19 Mr. Singer, if you would like to proceed.

20 MR. SINGER: Thank you, Your Honor.

21 Ladies and gentlemen, it's been a long three weeks
22 and we appreciate your close attention to this case. I know
23 it's not been the most exciting case at times, but I assure
24 you it's a very important case. It's very important to SCO,
25 it very important to individuals like Bill Broderick, John

1 Maciaszek, and Andy Nagle, men who have been with the
2 company for 20 years, going all the way back to AT&T, and
3 they are still there at SCO turning out UnixWare, providing
4 products for companies all over the country and the world,
5 and trying in a difficult situation to have the company
6 proceed.

7 These individuals and the customers, and some of
8 these have been long time or current customers, McDonald's,
9 NASDAQ, BMW, that business depends on the copyrights,
10 depends on having ownership of intellectual property that is
11 at the heart of their business.

12 You are going to be asked in this case two basic
13 important questions. It will be your responsibility to
14 decide, first, to declare that the UNIX, UnixWare copyrights
15 that existed back at the time of this transaction went with
16 the rest of the business, except for this royalty stream,
17 and belonged to SCO. That is very important and critical on
18 its own. And, second, you will be asked to determine, if
19 you agree with us, that there's been a slander on SCO's
20 title, to determine that and award a reasonable amount of
21 damages to compensate SCO in connection with that slander.

22 Now as the Court has instructed you, you are the
23 judges of the facts and, in doing so, you must determine
24 credibility. And credibility is, in part, a question of the
25 consistency of witnesses with one another. And I would like

1 Now you might remember about three weeks ago
2 Novell's counsel telling you that it was important to listen
3 for the rest of the story. I think he invoked Paul Harvey.
4 I was thinking about that statement all during the first
5 week of this trial, and I was doing that because it seemed
6 that all during that week Novell was focused on this
7 language in the schedule of excluded assets, excluding
8 copyrights, when the rest of the story was that language
9 didn't exist anymore. That language was replaced by
10 Amendment No. 2. So the language that they have spent more
11 hours in this trial on than anything else is simply not in
12 the agreement and hasn't been in there since 1996. That's
13 really the rest of the story on this because under the plain
14 language of the asset purchase agreement with Amendment 2,
15 it is very clear that the assets, the copyrights
16 transferred.

17 You have a schedule of included assets, which
18 you've seen many times and you will be able to look at when
19 you deliberate, it says, all rights and ownership of UNIX
20 and UnixWare on all these products, including the UnixWare
21 products, and you haven't heard any evidence there are any
22 products on there that -- products missing from that list.
23 This includes what we're talking about, that all rights and
24 ownership of UNIX and UnixWare are transferred.

25 And then you had the old language that excluded

1 copyrights and trademarks. Now you have the current
2 language replaced by Amendment 2 which says that Novell gets
3 to keep copyrights, except for the copyrights and trademarks
4 owned by Novell as of the date of the agreement required for
5 SCO to exercise its rights with respect to the acquisition
6 of UNIX and UnixWare technologies. That really is the heart
7 of this case. With Amendment No. 2, it is clear that those
8 copyrights were transferred.

9 Now I would submit to you that Novell has admitted
10 the fact that SCO, in light of Amendment No. 2, owns those
11 copyrights, and they did that on two occasions. The first
12 occasion that that was admitted goes back to June 6th of
13 2003 when Novell issued the press release, when they -- of
14 course, you've heard about Amendment No. 2 when they said
15 they didn't have it and it turns out they did have it. They
16 didn't know it was signed. They claimed they had a signed
17 copy in the files. But the important point here on
18 copyright ownership is their recognition that it appears to
19 support SCO's claim that ownership for certain copyrights of
20 UNIX did transfer to SCO in 1996. So that's the first time.

21 The second time that that was admitted was in
22 front of you a few days ago on March 23rd, and that was when
23 Allison Amadia admitted -- and certainly she started out in
24 her testimony being adverse to SCO and in favor of Novell.
25 Then under Mr. Normand's cross-examination, listen to what

1 she said. She was asked, now you agree that under the plain
2 language of Amendment 2 Novell has included in the transfer
3 of assets the copyrights required for SCO to exercise its
4 rights in UNIX and UnixWare. Her answer was, the way I
5 wrote and intended Amendment No. 2 to be read is that this
6 language was saying that whatever copyright rights Santa
7 Cruz needed in order to exercise the rights it was given,
8 then they would have those rights.

9 Then a little bit later near the end of her
10 cross-examination she was asked, so if there are copyrights
11 that are required for SCO to exercise its rights, like the
12 UNIX and UnixWare trademarks, they were transferred,
13 correct. Her answer was yes.

14 Now there is no real dispute, ladies and
15 gentlemen, that the copyrights are required for the UNIX and
16 UnixWare business. You have heard a lot of evidence on
17 that. It has included Bob Frankenberg, the Novell president
18 and CEO, who said it was ludicrous to think about selling
19 software without selling the copyrights.

20 Doug Michels, the SCO founder and vice president,
21 equated it to breathing oxygen, that it's so essential.
22 There is no way this deal would have happened without
23 getting the copyrights.

24 Jim Wilt, who was the lead negotiator for Santa
25 Cruz, says that, you know, when you walk out the door, I

1 assume your head goes with you. That's how he equated it.
2 And, of course, the copyrights have to go with the company.

3 Steve Sabbath was asked, if you didn't own the
4 copyrights, how could you go after somebody that's pirating
5 your software, how could you enforce your rights to the
6 technology.

7 Bill Broderick said, if we couldn't protect our
8 software, we'd be out of business. This is how you protect
9 your software.

10 Now with Amendment No. 2, the APA makes sense.
11 Without it, the agreement doesn't make sense. The software
12 business without the copyrights, well, I would suggest to
13 you that's like a car without an engine, or maybe a house
14 without a roof, or maybe even suggest that it's an ice cream
15 sundae where you only get the cherry and not the ice cream,
16 as Mr. Braham suggested a couple days ago. It doesn't make
17 any sense.

18 Now with Amendment No. 2 all of the things fit
19 together and makes sense, beginning with the very recital at
20 the beginning of the document that says that this is the
21 sale of a business, the UNIX and UnixWare business, the
22 support of those products, all of that is what it being
23 sold. It is the intent that all of the business relating to
24 that be transferred. So it's consistent with the overall
25 intent of the deal.

1 There's been some discussion about the
2 consideration received. I suggest to you that it makes
3 sense because of the amount of money which Novell received.
4 Back in the opening you might remember seeing this slide
5 from Novell, the first one on the left-hand side, where it
6 suggests the purchase price was just the stock. The stock
7 itself was worth a lot of money, 40, \$50 million. You
8 wouldn't even receive that if you weren't transferring the
9 copyrights. But if you look at the entirety of that section
10 of the asset purchase agreement, you see that there was
11 another part to the payments which included the royalty
12 stream that would occur in the future, both from the
13 existing UNIX products and the UnixWare products.

14 If you look at Mr. Bradford's memo to the board
15 right before Novell approved this transaction, he identified
16 those four royalty streams, which turn into a lot of money.
17 The stock is worth about 40, \$50 million, \$50 million a year
18 in the UNIX royalties, the estimated present value of
19 \$60 million or so in the UnixWare royalties. So this was a
20 sale of a business. This wasn't simply serving as an agent,
21 as Mr. Braham suggested, to collect for someone else.

22 For instance, you've got here all the title to the
23 UNIX licenses. If you have a real estate agent handle your
24 house, you don't give them title to sell it. I don't know
25 of any real estate agents who would pay me something like

1 \$100 million to handle a transaction. This agency was very
2 limited to the collection of royalties that Novell was going
3 to keep, and the rest of this was the sale of a business.

4 Now Amendment 2 also is needed to make sense of
5 something you've heard me refer to and my colleagues refer
6 to throughout the trial, the license back provision, and
7 that's because -- and Novell has never been able to explain
8 this, it makes no sense for Novell to have kept the
9 copyrights and then the license back right to use them. If
10 they kept them, they wouldn't need the license back. That
11 is clear evidence that this was intended to be a sale of the
12 copyrights.

13 The license back of assets appears right in the
14 asset purchase agreement in section 1.6. Now Novell tries
15 to say, well, it only applied to the new products, so that's
16 why you had the license back. But the plain language of the
17 license back says, all of the technology included in the
18 assets, which means they are getting a license back to the
19 assets being sold. They wouldn't need a license to use that
20 if it wasn't for the fact they were selling the copyrights.

21 And, in fact, if you look at the technology
22 license agreement, it says specifically, as between Novell
23 and SCO, ownership of licensed technology shall reside in
24 SCO. We think that makes it very clear, and you have heard
25 a lot of witnesses say when I asked them or Mr. Normand

1 asked them that does it make any sense to have a license
2 back if you retained the copyrights, and everyone agreed
3 with that.

4 Now Amendment 2 -- with Amendment 2, the agreement
5 also makes sense in light of -- let's see, there we are.
6 With Amendment 2, the agreement also makes sense in light of
7 the testimony of the witnesses that you've heard. Now I
8 told you a few weeks ago in the opening, pointing to this
9 chart, that you would hear from ten witnesses drawn from
10 both the Santa Cruz and the Novell side of the transaction
11 who would agree that it was intended that the copyrights
12 were sold. All ten of those witnesses, either through video
13 deposition or through live testimony here, have so
14 testified.

15 I would like to start with the Santa Cruz side
16 because there's been a lot of attention here paid to what
17 Novell intended and what was going on at Novell's board
18 meeting. That's really not the issue before you. The issue
19 before you is what the two parties to a contract intended.
20 So you have to look at both parties' intent and how they
21 expressed that to each other. And there is no confusion at
22 all on the Santa Cruz side there. All of these executives
23 and negotiators testified consistently that this deal
24 required the transfer of the copyrights.

25 You remember Doug Michels. I think that was

1 pretty memorable videotaped testimony, wasn't it? He was
2 perplexed that anyone could even raise the issue.
3 Copyrights are like breathing oxygen. I'm going to read you
4 a little bit of his testimony. He says, I guarantee you, we
5 put copyright notices in every document we wrote. How could
6 we do that if we didn't own the copyrights? We put
7 copyright notices in every module of source code we wrote.
8 They all said we own the copyrights. We own the
9 intellectual property, and every action we took represents
10 that. I don't do a very good imitation of him.

11 THE COURT: Mr. Singer, remember, if you read too
12 fast, the court reporter will have difficulty.

13 MR. SINGER: I will try to read slower as well.

14 Michels also said, we took over the business. We
15 were in the business of selling intellectual property. We
16 were in the business of supporting the intellectual
17 property. We were in the business of providing marketing
18 materials. We couldn't do any of that without owning the
19 copyrights.

20 He was asked if any attorney from Santa Cruz ever
21 told him that Novell was asking for -- that he had to go to
22 Novell and ask them for the copyrights. He said, I think I
23 would have laughed them out my office.

24 Now you recall that you also heard testimony from
25 Steve Sabbath who said, when we bought the UNIX business

1 from Novell, all copyrights came with the product and
2 Amendment No. 2 was meant to confirm that, and he testified
3 to that.

4 In addition, you had Kimberlee Madsen. Ms. Madsen
5 has no interest in this litigation. She works for Apple.
6 She came here and testified clearly to you that the
7 copyrights were going with the assets. She was asked, do
8 you have a view, as you sit here, as to whether the parties
9 intended that the copyrights would be retained by Novell.
10 Answer, no. The intent was clearly to be that the
11 copyrights for the UNIX and UnixWare were to be transferred
12 to The Santa Cruz Operation.

13 And you heard Mr. Mohan, Mr. Wilt also. So there
14 is no question on the Santa Cruz side of the equation that
15 everyone agrees that the copyrights were part of the deal.

16 Now in a typical case you would expect to see the
17 Santa Cruz executives and attorneys saying one thing and the
18 Novell executives and lawyers saying something completely
19 different. The incredible thing about this case is that you
20 have numerous senior executives and lawyers who were with
21 Novell at the time who agree with Santa Cruz, who agree that
22 the copyrights were intended to be sold.

23 Now you have heard from Robert Frankenberg, the
24 chief executive officer at the time, on the first day and
25 again on the last day of testimony. I think he's probably

1 the most important witness in this trial. Ladies and
2 gentlemen, in the future, when I think of a stand-up guy,
3 I'm going to be thinking of Bob Frankenberg. He has no
4 financial or other interest in this. A lot of CEOs would
5 simply duck something like this and say they don't remember,
6 it's a long time ago. He didn't do that. He has given you
7 forthright testimony, both on the first day of trial and
8 yesterday, that this was a deal to sell the copyrights along
9 with the rest of the business.

10 He acknowledged that he missed that line item in
11 one part -- one word in a board resolution that he thought
12 was probably referring to the NetWare copyrights, but that
13 it was clear, because he was the guy at the top, that this
14 was a sale of the business, including the copyrights.
15 That's why the error had to be fixed a year later with
16 Amendment No. 2.

17 His testimony is consistent with the testimony of
18 Duff Thompson, of Ty Mattingly and Ed Chatlos, the people
19 most involved in the negotiation of the deal. They were the
20 people out there in California for months negotiating this.
21 These were the people who looked at Alok Mohan and the other
22 Santa Cruz people across the table and said, you are getting
23 the business lock, stock and barrel, except, of course, for
24 those royalties which were going to help pay for it. These
25 were the people who came here and testified that there had

1 never been any suggestion made in that process of Novell
2 holding back the copyrights.

3 Now Novell suggests some of these witnesses, who,
4 remember, are their own executives, should be discredited
5 because some of them later went to the business and
6 therefore had a financial interest in SCO. What I would
7 submit to you, though, is their testimony is consistent with
8 individuals who have no such interest, Mr. Levine,
9 Mr. Frankenberg. I think they insulted Mr. Chatlos, their
10 senior director, by suggesting because his wife had a little
11 stock that somehow he isn't telling the truth when he said
12 this was the deal he negotiated. And Mr. Thompson, who you
13 can judge, was a forthright witness.

14 Basically, what Novell is telling you is that you
15 would have to believe that all ten of these witnesses, all
16 ten, half of whom are former senior executives, were either
17 mistaken or lying in order to agree with what Novell would
18 have you believe in this case.

19 Now how did this happen? How did the problem
20 happen that required Amendment 2? I think we have gotten a
21 little more insight into that over the last several days. I
22 think you see what happens when you have a set of lawyers
23 rushing to document a deal under a lot of time pressure.
24 This is Tor Braham's forced march. Mr. Braham ignored
25 months of negotiations between the parties that preceded the

1 There's also Jack Messman's admission that they
2 tried to publicize this press release in May as widely as
3 possible. That exhibited intent to harm SCO. It's not
4 enough to say, well, we wanted to make money, we wanted to
5 get our story out there. That's not a defense for spreading
6 a falsehood as widely as possible. There is evidence that
7 these acts were made to injure SCO because of SCO's taking
8 on of IBM.

9 Novell's attempted waivers of SCO's legal rights,
10 while they are an issue that the Court will deal with in
11 terms of whether those were proper, you can consider the
12 fact that they made those waivers as elements of intent,
13 that those were made in the same year, at the same time that
14 a \$50 million investment in Novell's Linux purchase was made
15 by IBM. You can consider the attempt by Mr. Stone and
16 Mr. LaSala to cover up the fact that these were done at
17 IBM's request by not telling the truth about it the first
18 time around. And that is also evidence of malice and effort
19 to hurt SCO in order to help a third party.

20 So thank you for your attention, ladies and
21 gentlemen. I'll have the opportunity to address you for a
22 little bit at the end of the closing arguments, but at this
23 time I would like to turn the podium over to Mr. Hatch.

24 MR. HATCH: As Mr. Singer just talked about, the
25 SCOsource licensing program began to have sales. There was

1 At the conclusion I too will turn to the verdict
2 form that you will receive, and suggest to you what I would
3 recommend on behalf of Novell would be the appropriate
4 result for you to consider and make as you deliberate.

5 Now, the first question that is presented is this
6 fundamental point of whether or not the amended asset
7 purchase agreement, this contract, transferred the UNIX and
8 UnixWare copyrights as of the date of the asset purchase
9 agreement from Novell to SCO. The answer is it did not.
10 How do we know that? Well, first of all, we do need to look
11 at the parties' intent. There are two parties to this
12 contract.

13 You saw time and time again, and I apologize for
14 the repetition, but you saw the minutes of the board of
15 director meeting where Novell, governed by its board of
16 directors, met and considered the asset purchase agreement
17 before it was signed, and very clearly presentations were
18 made to the board, and there is a resolution which states
19 without equivocation that Novell will retain all of its
20 patents and copyrights and trademarks. That very language,
21 and you'll see it in Exhibit Z-3 when you have a chance to
22 retire to the jury room and look at it, that very language
23 is what actually appears in the contract.

24 I hold this book up again, and you'll have a
25 chance to look at Schedule 1.1-A which sets forth in four

1 short pages the list of assets that were sold. The contract
2 speaks very clearly that only the assets listed in that
3 schedule were the ones being sold. This was not the sale of
4 an entire business, it was the sale of specified assets, and
5 that is what the contract tells us.

6 You'll also have a chance to then turn to Schedule
7 1.1-B, which is the express list of excluded assets. Over
8 and again you have heard that all copyrights and trademarks
9 except for the trademarks UNIX and UnixWare were excluded.

10 Now, one of the things that was passed by us
11 quickly in the early presentation, but I trust it didn't get
12 past you, is that this asset purchase agreement signed on
13 September 19, 1995 did not go without review. There was
14 almost three months from the time it was signed until the
15 time that the deal closed on December 6, 1995 where everyone
16 involved had a chance to review it. If somebody somehow
17 thought the wool had been pulled over their eyes, or they
18 didn't understand or there was a mistake or a
19 misrepresentation or an omission, both sides had full
20 opportunity to review it.

21 In fact, they did. You'll see when you retire to
22 the jury room and you can look at Exhibit T-5 which is the
23 amendment number one to the asset purchase agreement. It
24 covers in a span of some ten or 12 pages modifications made
25 to the initial asset purchase agreement. Importantly,

1 Schedule 1.1-A which identified the assets was not modified
2 to include copyrights, and significantly Schedule 1.1-B,
3 which expressly excluded copyrights, was not changed either.

4 There can be no suggestion, no credible suggestion
5 that somehow the wool was pulled over somebody's eyes. Both
6 sides had a full chance to review it and both sides had a
7 chance to make suggested revisions, and there was not even a
8 suggestion, let alone an agreement, that the excluded
9 copyrights ought to be modified.

10 Now, in addition, on December 6, 1995 there was a
11 document that was entered into that actually transferred the
12 assets. The asset purchase agreement itself transfers
13 nothing. Instead, it is a promise that Novell would
14 transfer assets, but the actual document that accomplishes
15 that was the bill of sale. The bill of sale that you saw,
16 Exhibit W-5, references the transfer only of the assets.
17 The assets are, again, described in the asset purchase
18 agreement, so to really understand what was sold one would
19 have to look to the bill of sale and say what does the bill
20 of sale say? The bill of sale tells us that to understand
21 what was sold we look to the asset purchase agreement, the
22 assets, Schedule 1.1-A. So that is straightforward and
23 clear.

24 Now, there is also something that was passed by,
25 and you'll recall that Novell acquired the entire UNIX

1 block. What initially Novell had and owned, and that the
2 part it had acquired from AT&T, is represented by the small
3 block on the left, the UNIX and the UnixWare copyrights that
4 pertain to Versions 1.0 and 2.0. Under the asset purchase
5 agreement certainly SCO had the right to use that
6 intellectual property without ownership to develop its
7 building block on top, the UnixWare copyrights. Whatever
8 SCO has developed on its own, its derivative work, it owns
9 the copyrights to. There has never been a challenge to
10 that. Novell does not dispute that. SCO has every right
11 and has and did for eight years before this litigation was
12 commenced operate that business. It was not until Mr.
13 McBride and SCO came up with its new litigation strategy,
14 that the suggestion has been made that copyrights were
15 needed.

16 Again, you heard the suggestion that somehow Mr.
17 Braham or Mr. Bradford snuck the copyright exclusion into
18 the A.P.A., that it was done in a corner, no one saw it, and
19 no one had time to think about it. That is belied by the
20 actual evidence. Mr. Levine, he is the one who was an AT&T
21 lawyer who came over to Novell, and he is the one who
22 actually then moved on to SCO after the transaction. He is
23 the one who provided comments on Schedules 1.1-A and B. You
24 heard and saw what he said. This is his very draft that
25 supposedly was snuck by or snuck in. You will see that in

1 his draft of Schedule 1.1-B, the excluded assets, very
2 clearly all copyrights and trademarks except for the
3 trademarks UNIX and UnixWare. That wasn't a last second
4 invention. Mr. Levine, who, again, SCO purports as its
5 witness, actually wrote that language.

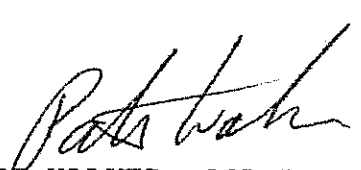
6 Now, was Mr. Frankenberg duped? Here is the
7 question. Now, do you recall whether or not you ever
8 reviewed this excluded asset schedule in connection with the
9 transaction? I am sure that I did, yes.

10 Mr. Mattingly, he also came to court. Sir, to
11 your knowledge did the lawyers and business people at Santa
12 Cruz have the opportunity to read the included and excluded
13 asset schedule before they agreed to the A.P.A.? Yes. No
14 question that those people had a chance to do that.

15 Here is an interesting document. You may have
16 seen it from two sources. The first time you saw it was
17 when Mr. Mattingly came into court and had that folder that
18 none of us had seen before, said that he had it in his
19 garage, he had given the documents or showed them to SCO's
20 lawyers without ever notifying Novell, and I hadn't seen
21 them before and I asked him for them. This is one of them.
22 On it is a draft, a handwritten notation of September 16th,
23 1995, before the transaction closed, and it includes the
24 exclusion of all copyrights and trademarks. It was not a
25 secret. People knew about it.

C E R T I F I C A T E

I hereby certify that the foregoing matter is transcribed from the stenographic notes taken by me and is a true and accurate transcription of the same.


PATTI WALKER, CSR-RPR-CP
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DATED:

3-26-2010